



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>





HARVARD LAW SCHOOL
LIBRARY

244

100

C#

THE LAW

OF

REAL PROPERTY

(Based on Minor's Institutes)

By

RALEIGH COLSTON MINOR, M. A., B. L.

Professor of Law in the University of Virginia

IN TWO VOLUMES

VOL. II

ANDERSON BROS., PUBLISHERS
UNIVERSITY OF VIRGINIA
1908

TX
M666r

Copyright, 1908
By Raleigh C. Minor

All rights reserved

Printed, stereotyped and bound by
The Michie Co., Charlottesville, Va.

THE LAW OF REAL PROPERTY.

DIVISION IV.

MODES OF ACQUIRING TITLE TO REAL PROPERTY.

§ 966. Preliminary Outline of Discussion.

967. Anomalous Case of Title by Escheat.

968. Title by Purchase and Descent Distinguished.

1. By Purchase at Common Law the Estate Acquires a New Heritable Quality.

969. 2. Purchaser Not Liable for Predecessor's Debts, as in Case of Descent.

§ 966. Preliminary Outline of Discussion.

In the three preceding divisions of this work we have discussed the *tenures* whereby real property might be held; the *several sorts* of real property, as corporeal and incorporeal; and the various *estates* or *interests*, which one might have in real property, with their incidents. We now have reached the fourth and last division, in which we shall inquire into the various *modes of acquiring title* to real property.

Under this division of the subject, the first great classification, usually made, and which will be adhered to in this work, is into (1) Title *by descent* and (2) Title *by purchase*, which will constitute the two parts of this grand division.

Title by descent arises by act of the law, where land descends from ancestor to heir. Title by purchase (using the term "purchase" in a technical sense) arises where the title is vested by the *parties' own act or agreement*, as where land is acquired by conveyance, devise, contract to convey, dedication, adverse possession, etc., it being immaterial for the purposes of this classification whether it be acquired gratuitously or for a price.¹

It will be observed that this analysis of the modes of acquir-

1. 2 Min. Insts. 522; 2 Bl. Com. 243; 201, n. (2); 1 Lom. Dig. 743; 2 Th. Co. Lit. 156, n. (D), 184, n. (A).

ing title to real estate is not entirely exhaustive, since there are certain methods of acquiring title, which arise by operation of *law*, and which yet are not to be classed as instances of title by *descent*. Such are the life estates by the curtesy and in dower, which, however, have been fully treated elsewhere.²

§ 967. Anomalous Case of Title by Escheat.

Title by escheat also arises in part by act of the *law*, resembling descent in that the land passes without the owner's act or agreement; but it may also be classified, and generally is, as a mode of title by *purchase*, in that the title is finally transferred to the state by escheat only after proceedings have been instituted by the state for that purpose. Title by escheat arises wherever land is left without any known owner, in which event it escheats to the Commonwealth, through the medium of an escheator and his jury, or if the title be *equitable*, through the medium of a bill in equity filed by the escheator of the county or corporation wherein the land is situated.¹

Escheat occurred, at common law, in the following cases; (1) Where the owner of land dies intestate, leaving no person capable of succeeding to the estate as his heir, either leaving behind him no blood relation at all,² or only such relatives as are incapable of taking as heirs by reason of illegitimacy,³ being of the half-blood only or not being of the blood of the first purchaser,⁴ alienage,⁵ or attainder of treason or felony;⁶ or (2) where the owner of the estate is an *alien*, it seems that the land escheats at common law.⁷ But in the case of a *dissolved corporation*, an exception to this general principle was made at common law, and, though land were owned by such corporation in fee simple, it did not upon the dissolution escheat, but *re-*

2. Ante, § 223, et seq.; 253, et seq.

1. Va. Code, 1904, § 2374, et seq.; 2 Min. Insts. 548, et seq.

2. 2 Min. Insts. 555.

3. 2 Min. Insts. 555, 556.

4. 2 Min. Insts. 555.

5. 2 Min. Insts. 556.

6. 2 Min. Insts. 556, 557.

7. 2 Min. Insts. 658.

verted to the donor or his heirs as a sort of *quasi reversion*.⁸

In Virginia, escheat occurs, as at common law, (1) wherever there is a total failure of a decedent's kindred by blood or by marriage, either living at his death or *en ventre sa mere* and born within ten months thereafter;⁹ or (2) Where there is no other such relative but a *bastard* (who can only inherit on the part of his *mother*);¹⁰ or (3) Where there is no other such relative but an *alien enemy*.¹¹

But neither the alienage of the owner nor of his heir (if he be an *alien friend*), nor the conviction of either of treason or felony, will operate an escheat in Virginia; it being enacted as regards the first case that "any alien, not an enemy, may acquire by purchase or descent, and hold, real estate,"¹² and also that "in making title by descent it shall be no bar to a party that any ancestor (whether living or dead), through whom he derives his descent from the intestate, is or hath been an alien;"¹³ and with regard to the second, that "no suicide nor attainder of felony shall work a corruption of blood or forfeiture of estate."¹⁴

§ 968. Title by Descent and by Purchase Distinguished

—1. By Purchase at Common Law the Estate Acquires a New Heritable Quality.

Land acquired by *purchase* becomes descendible, at common

8. 2 Min. Insts. 557; 2 Bl. Com. 256; 1 Th. Co. Lit. 195, 196; Angel & Ames, Corp. § 195. The modern doctrine, however, is that upon the dissolution of a corporation, it, nevertheless, in contemplation of law, still continues to exist for the purpose of disposing of its property, real and personal, collecting and paying its debts, and distributing the residue amongst its shareholders. 2 Min. Insts. 557, 558; *Broughton v. Pensacola*, 93 U. S. 268; *Meriwether v. Garrett*, 102 U. S. 512; *State v. Bank of Tennessee*, 5 Baxt. (Tenn.) 101. And this is now provided for expressly in Virginia by statute. Va. Code, 1904, § 1105 e (cl. 30).

9. 2 Min. Insts. 558; Va. Code, 1904, §§ 2548, 2555.

10. 2 Min. Insts. 559; post, § 997.

11. 2 Min. Insts. 559; Va. Code, 1904, § 43.

12. Va. Code, 1904, § 43; 2 Min. Insts. 559.

13. Va. Code, 1904, § 2551; *Jackson v. Sanders*, 2 Leigh (Va.) 109.

14. Va. Code, 1904, § 3883; 2 Min. Insts. 560; 1 Lom. Dig. 815.

(1041)

law, to the *new* owner's blood in general, as if it were a feud which had existed in his family from times of *indefinite antiquity*, whereby it becomes inheritable by his heirs general, first of the *paternal*, then of the *maternal*, line; whereas land acquired *by descent* can, at common law, pass to those heirs only who are of the blood of the *first purchaser*, that is, of the blood of that ancestor from whom he derives the land by descent.¹

This difference has no existence in Virginia. By our law of descents, no change is wrought in the inheritable quality of land where the title accrues by purchase. This arises from our having abolished the feudal principle of preferring the blood of the first purchaser of the inheritance, in seeking for an heir, *except only* in the single case of *an infant* dying without issue, having title to real estate derived by gift, devise or descent from *one of his parents*, and in that single case any discrimination between descent and purchase is excluded by the terms of the exception itself.²

§ 969. Same—2. Purchaser Not Liable for Predecessor's Debts, as in Case of Descent.

An estate taken *by descent* subjects the heir at common law to pay (so far as the value of the land extends) all the debts of the ancestor due by any *contract of record* (*e. g.*, a judgment or recognizance), or by any *contract of specialty*, that is, *under seal*, which *expressly binds the heirs*. On the other hand, when the land comes *by purchase*, it is not charged with the preceding owners' debts, except in so far as it may be subject to *the lien* of a mortgage or judgment, etc., or where he takes as a *volunteer*, that is, without consideration.¹

This diversity prevails even more extensively in Virginia than at common law, because with us a man's lands in the hands of

1. 2 Min. Insts. 522; 2 Bl. Com. 201, 243; 1 Lom. Dig. 773, 774; 2 Th. Co. Lit. 185, 186, n. (A).

2. Va. Code, 1904, §§ 2548, 2556; 2 Min. Insts. 522.

1. 2 Min. Insts. 522, 523; 2 Bl. Com. 201, n. (2), 243; 1 Lom. Dig. 773; 2 Th. Co. Lit. 185, 186, n. (A); Piper v. Douglas, 3 Gratt. (Va.) 372, 373.

his heir are liable to pay, not alone his debts of record and of specialty binding the heirs, but *all of his debts* of every description, but only after the personal estate, not specifically bequeathed, has been exhausted.²

2. Va. Code, 1904, § 2665; 2 Min. Insts. 523; *Rogers v. Denham*, 2 Gratt. (Va.) 201; *Elliott v. Carter*, 9 Gratt. 541; *Lewis v. Overby*, 31 Gratt. 601, 618, et seq.; *Ryan v. McLeod*, 32 Gratt. 367, 374, et seq.
(1043)

PART I.

TITLE BY DESCENT.

§ 970. Preliminary Outline of Discussion.

971. Nature of Title by Descent.

972. Theory of Kindred, Lineal and Collateral.

973. Modes of Measuring Degrees of Relationship.

I. Lineal Consanguinity.

974. II. Collateral Kindred.

1. Rule of Canon Law.

975. 2. Rule of the Civil or Roman Law.

976. 3. Rule of the Common Law—Same as the Canon Law.

§ 970. **Preliminary Outline of Discussion.**

We are to consider (1) The nature of title by descent; (2) The theory of kindred, lineal and collateral; (3) The modes of measuring degrees of relationship; (4) Title by descent at common law; (5) Title by descent in Virginia.

§ 971. **Nature of Title by Descent.**

Descent, or hereditary succession, is the title whereby one, on the death of his ancestor, acquires the ancestor's estate in real property, by right of representation as his *heir at law*. An heir, therefore, is that person of the kindred of a decedent upon whom the law casts the estate in *real property* immediately on the death of such decedent; and such estate so descending to the heir is called the inheritance.¹

§ 972. **Theory of Kindred, Lineal and Collateral.**

Kindred includes those persons related to one by marriage, or *affinity*, as well as by blood, or *consanguinity*; but as the common law always, and the statute of descents with us, with rare exceptions, selects the heir from the kindred by blood or consanguinity; (that is, those descended from a common ancestor), what is to be said is mainly applicable to the latter.¹

1. 2 Min. Insts. 523; 2 Bl. Com. 201.

1. 2 Min. Insts. 523, 524; 2 Bl. Com. 202.

Consanguinity is either *lineal* or *collateral*. Lineal consanguinity is the relationship that subsists between persons of whom one is descended *directly from the other*. Such for example, as that between father and son, grandfather and grandson, etc.²

Collateral consanguinity is that relationship which subsists between persons who are descended from the *same common ancestor*, but not one from the other, such as that between brothers, between uncle and nephew, between cousins, etc.³

§ 973. Modes of Measuring Degrees of Relationship—I. Lineal Consanguinity.

In the direct line (that is, in the line of lineal consanguinity), every generation, reckoning either upwards or downwards, constitutes a degree, and this mode of reckoning degrees in the *direct line* universally obtains, as well in the civil as in the canon and common law.¹

§ 974. II. Collateral Kindred—1. Rule of Canon Law.

The *canon* law reckons from the common ancestor down to the *more remote party*; thus, brothers are related, by the canon law mode of computation, in the first degree, first cousins in the second, second cousins, and also third, in the third degree, and fourth cousins in the fourth.¹

§ 975. Same—2. Rule of the Civil or Roman Law.

The *civil* law reckons from one party up to the common ancestor, and then down to the other.

Thus, by the civil law computation, brothers are related in the second degree, first cousins in the fourth, second cousins in the fifth, third cousins in the sixth, and fourth cousins in the seventh.¹

2. 2 Min. Insts. 524; 2 Bl. Com. 203.

3. 2 Min. Insts. 524; 2 Bl. Com. 204.

1. 2 Min. Insts. 524. See Table of Consanguinity.

1. 2 Min. Insts. 524; 2 Bl. Com. 206. See Table of Consanguinity.

1. 2 Min. Insts. 524; 2 Bl. Com. 207. See Table of Consanguinity.

§ 976. Same—3. Rule of the Common Law—Same as the Canon Law.

The canon law reckons degrees of consanguinity with a view to determine *the validity of marriages*, and so it has reference to the amount of *common blood* which the parties have. The civil law adopts its computation with a view to the *distribution of estates*, and, therefore, it looks to the proximity or remoteness of the parties in respect to one another. Seeing that the common and civil law have the same object, it might have been expected that the common law would have adopted the computation of the civilians, rather than that of the canonists. We shall see, however, that the common law, in the disposition of inheritances, has a chief regard to the *blood of the first purchaser*, who for the most part is the common ancestor, so that proximity *to him* is of more importance than proximity of the parties one to another.¹

1. 2 Min. Insts. 525; 2 Bl. Com. 224, 225. See Table of Consanguinity, page 1047.
(1046)

Table of Consanguinity

CHAPTER XXXV.

TITLE BY DESCENT AT COMMON LAW.

- § 977. Outline of Discussion.
- 978. Subject Matter of Descent at Common Law.
- 979. Doctrine of *Possessio Fratris* at Common Law.
- 980. Distinction between Heirs Apparent and Heirs Presumptive.
- 981. Common-Law Canons of Descent—Primary and Secondary Canons.
- 982. Canon I—Inheritances Shall Lineally Descend in Infinitum to the Issue of the Person Who Last Died Actually Seised, but Shall Never Lineally Ascend.
- 983. Canon II—The Male Issue Shall Be Admitted before the Female.
- 984. Canon III—Of Two or More Males in Equal Degree the Eldest Only Shall Inherit, but the Females All Together.
- § 985. Canon IV—The Lineal Descendants in Infinitum of Any Person Deceased Shall Represent Their Ancestor; That Is, Shall Stand in the Same Place as the Person Himself, Had He Been Living.
- 986. Canon V—On Failure of Lineal Descendants or Issue of Person Last Seised, the Inheritance Shall Descend to His Collateral Relatives, Being of the Blood of the First Purchaser, Subject to Canons II, III and IV.
- 987. Canon VI—The Collateral Heir of Person Last Seised Must Be His Next Collateral Kinsman of the Whole Blood.
- 988. Canon VII—In Collateral Inheritances, the Male Stock Shall Be Preferred to the Female, (That Is, Kindred Derived from the Male Ancestors, However Remote, Shall Be Admitted before Those Derived from the Females, However Near) unless the Land Has in Fact Descended from a Female.

§ 977. Outline of Discussion.

We shall examine (1) The subject matter of descent at common law; (2) The doctrine of *possessio fratris*; (3) The distinction between heirs apparent and heirs presumptive; (4) The common law canons of descent.

§ 978. Subject Matter of Descent at Common Law.

The subject matter of descent at common law embraces only (1048)

estates of inheritance in real property, where the ancestor from whom the descent is claimed, *died actually seised* of the inheritance at the time of his death. The law casts the inheritance upon the heir immediately upon the ancestor's death, but it is merely a *seisin in law*, which will not enable him, at common law, to transmit the inheritance to *his* heirs. His ownership becomes complete for all purposes only by an actual corporal *entry*, either by himself, or by his agent or tenant.¹

§ 979. Doctrine of *Possessio Fratris* at Common Law.

The heir's ownership becomes complete, as just explained, only by the actual corporal entry of the heir himself, or of his agent or tenant in his behalf.¹

Hence comes the doctrine of *possessio fratris facit sororem esse hæredem*, or as it is commonly called, the doctrine of *possessio fratris*, which is where a man has a son and daughter by one wife, and a son by a second wife, and dies seised of an inheritance. If the older son does not actually enter upon the premises, but dies before such entry, the younger son succeeds, as heir to *his father*, the person who *died last actually seised*. But if the older son enters before his death and *dies actually seised*, the younger son, being of the half blood to him, cannot, at common law, be his heir and, therefore, the sister succeeds *possessione fratris*.²

§ 980. Distinction between Heirs Apparent and Heirs Presumptive.

No person can be the actual, complete heir of another, until the ancestor is dead. *Nemo est hæres viventis*. Before that time the person who is next in the line of succession is called an heir apparent, or heir presumptive; *apparent* when the right of inheritance is indefeasible (that is, by the birth of any nearer relation), provided he outlives the ancestor, as the eldest son; and *presumptive* when, if the ancestor should die at the moment,

1. 2 Min. Insts. 525; 2 Bl. Com. 201, n. (4), 208.

1. 2 Min. Insts. 525; 2 Bl. Com. 201, n. (4).

2. 2 Min. Insts. 525; 2 Bl. Com. 224, 227, n. (28).

the person would, in the present circumstances of things, be the heir, but whose right to inherit may be defeated by the contingency of some nearer heir being born, as a brother or nephew, whose presumptive succession may be destroyed by the birth of a child.¹

And this divestment of the inheritance may, at common law, occur after the estate has *actually descended* by the death of the owner, to such presumptive heir. Nay, the divestment may occur repeatedly in the same case. Thus, if one die seised of land, leaving as his next of kin a father and mother, and a sister of the father, inasmuch as inheritances cannot lineally *ascend*, the *sister* shall be, by the common law, his heir presumptive, and may actually succeed to the possession of the inheritance. But the subsequent birth, at any distance of time, of a *brother* to such female heir, will divest the estate out of her, and he, the decedent's uncle, may lose it to an *afterborn sister of decedent*, from whom it may be divested by the subsequent birth of a *brother*, in whom it finally vests as *heir apparent*.²

This doctrine, which is certainly inconvenient, was altered by our first statute of descents, which took effect 1st January, 1787, by a provision that *none but children* of the intestate should inherit, unless they were *in being*, and capable to take as heirs at the death of the intestate. This supposes, of course, that the child is at least *en ventre sa mere* at that time but limits the case to the *children* of a decedent.³

Since 1840, this policy has been extended to *all persons*. "Any person," says the statute at present, "*en ventre sa mere*, who may be born within ten months after the death of the intestate, shall be capable of taking by inheritance, in the same manner as if he were in being at the time of such death."⁴

Thus, in Virginia, if one die leaving a brother and a widowed mother, and the mother afterwards marry and have a child,

1. 2 Min. Insts. 525, 526; 2 Bl. Com. 207.

2. 2 Min. Insts. 526; 2 Bl. Com. 208, n. (9).

3. 2 Min. Insts. 526, 447, 448; 12 Hen. Stat. 138; *Reeve v. Long*, 3 Lev. 408; *Blunt v. Gee*, 5 Call (Va.) 481, 512.

4. 2 Min. Insts. 526; Va. Code, 1904, § 2555.
(1050)

it would appear that that child could take nothing as heir of the decedent, though he is his half-brother, for he is *not born within ten months* after the death of the intestate.

§ 981. Common Law Canons of Descent—Primary and Secondary Canons.

The canons of descent at common law, as enumerated by Blackstone, are *seven*, of which five are devoted to determine the persons who are to take as heirs, and the shares wherein they are to take, and may therefore be called *primary canons*; and the remaining two are employed as auxiliary, in order to ascertain the application of the former, and so may be denominated *secondary canons*. The primary canons, as they assign the inheritance to the lineal descendants, or to collateral kindred of the decedent, may again be subdivided accordingly, into such canons as relate to the *lineal* kindred as heirs, and such as relate to the *collateral* kindred as heirs.

All these canons savor more or less of feudal policy, in which they doubtless originated, and some of them are warranted by no other than feudal considerations. It is, therefore, remarkable that all of them were adhered to with tenacity (although several of them had for ages become unadapted to the existing state of English society), until 1834, when, by statutes 3 & 4 Wm. IV., c. 106, followed, in 1859, by 22 & 23 Vict. c. 35, material innovations were introduced.

The applications of these canons will be better understood by reference to the *Table of Descents*.¹

§ 982. Canon I—Inheritances Shall Lineally Descend in Infinitum to the Issue of the Person Who Last Died Actually Seised; but Shall Never Lineally Ascend.

This canon implies, it will be observed, that the ancestor must be actually dead before the inheritance can take effect, which is in accordance with the maxim, *nemo est hæres viventis*. It implies secondly, that the ancestor must have had *actual seisin* in fee simple of the lands by his own entry, or by the possession of his or his ancestor's lessee for years, or by receiving rent

1. 2 Min. Insts. 526, 527; 2 Bl. Com. 240. See Table of Descents.
(1051)

from a lessee of the freehold, or in case of an incorporeal hereditament, by what is equivalent to corporeal seisin, such as the receipt of rent, the enjoyment of a way or common, etc. And thirdly, it implies that the ancestor was so seised *at his death*; the law requiring this notoriety of possession at that time, as evidence that the ancestor had that property in himself which is now to be transmitted to his heir. This seisin of any person, at his death, makes him the root or stock whence all future inheritance, by right of blood, must be derived; which is very briefly expressed in the maxim, *seisina facit stirpitem*.¹

This rule, so far as it is affirmative and relates to *lineal* descents, is almost universally adopted by all nations; and it seems founded on a principle of natural reason that the possessions of parents should, upon their decease, if transmissible at all, go in the first place to their children, and descendants. But the *negative* branch, which excludes parents and all lineal ancestors from succeeding to the inheritance of their offspring, is peculiar to the common law of England, and to those countries whose jurisprudence is tinctured with the policy of feuds. It is an express rule of the feudal law, that *successionis feudi talis est natura, quod ascendentes non succedunt*. Henry I., indeed, among other restorations of the old Saxon laws, restored the right of succession in the ascending line, but in the time of Henry II., Glanvil lays it down as established law that *hereditas nunquam ascendit*; which until 1834 remained an invariable maxim.²

These circumstances evidently show the negative part of the rule, at least, to be of feudal original; and so viewed it seems to have been in its origin not wholly an unreasonable doctrine. For if the feud of which the son died seised was really *feudum antiquum*, or one derived to him from his ancestors, the father could not possibly succeed to it, because it must have passed him in the course of descent, before it could come to the son; unless it were *feudum maternum*, or one descended from his mother, and then for other reasons (which will appear hereafter), the

1. 2 Min. Insts. 527; 2 Bl. Com. 207, et seq.; 2 Th. Co. Lit. 164, 177, et seq., 182.

2. 2 Min. Insts. 528.
(1052)

father could in no wise inherit it. And if it were *feudum novum*, or one newly acquired by the son, then only the descendants from the body of the feudatory himself could succeed, by the known rule of the early feudal constitutions, which was founded as well upon the personal merit of the vassal, which might be transmitted to his children, but could not ascend to his progenitors, as also upon the consideration of military policy, that the decrepit grandsire of a vigorous vassal would be but indifferently qualified to succeed him in his feudal services. Nay, even if the *feudum novum* were held by the son (as in practice it commonly was), *ut feudum antiquum*, or with all the qualities annexed to a feud descended from his ancestors, such feud must in all respects have descended *as if it had been really* an ancient feud; and, therefore, could not go to the father, because if it had been an ancient feud, the father must have been dead before it could have come to the son. Thus, whether the feud was strictly *novum*, or strictly *antiquum*, or whether it was *novum* held *ut antiquum*, in none of these cases could the father possibly succeed.³

But as Mr. Christian (in his notes to Blackstone) observes, there is not an entire consistency in applying these rules; for if the father does not succeed to the estate because it must be presumed that it has passed him in the course of the descent, the same reason ought to prevent an elder brother from inheriting from the younger. And if it does not pass to the father, lest the lord should have the services of a decrepit feudatory, the same principle should *a fortiori* exclude the father's eldest brother from the inheritance. Yet the elder brother is permitted to succeed to the younger, and the uncle, although older than the father, to the nephew.⁴

3. 2 Min. Insts. 528. These reasons drawn from the history of feuds are certainly more satisfactory than the very quaint one of Bracton (Lib. III, c. 29), adopted by Lord Coke (2 Th. Co. Lit. 162, 163), which regulates the descent of lands according to the laws of gravitation, "*Descendit itaque jus, quasi ponderosum quod cadens deorsum recta linea, et nunquam re-ascendit.*"

4. 2 Min. Insts. 529; 2 Bl. Com. 211, 212, n. (13). See 2 Th. Co. Lit. 163, n. (8); Ratcliffe's Case, 3 Co. 40.

§ 983. Canon II—The Male Issue Shall Be Admitted before the Female.

The preference of males to females is agreeable to the law of succession amongst the Jews, and also amongst the Athenians; but was unknown to the laws of Rome, which made no distinction between brothers and sisters. The reason of the preference by the common law is deduced from feudal principles; for by the genuine and original policy of that constitution, no female could ever succeed to a proper feud, being incapable of performing those military services for the sake of which that system was established. The common law, however, does not extend to a *total exclusion* of females, like the Salic law and others; it only postpones them to males of the same degree.¹

§ 984. Canon III—Of Two or More Males in Equal Degree the Eldest Only Shall Inherit, but the Females All Together.

The Jews allowed some, although not an exclusive, advantage to primogeniture, giving to the *eldest son* a double portion of the inheritance. The Greeks, Romans, Britons, Saxons, and even originally the Feudists, divided the lands equally; some among all the children at large, and some among the males only. But when the emperors began to create honorary feuds, or titles of nobility, it was found necessary (in order to preserve their dignity) to make them impartible, or (as they styled them) *feuda individua*, and in consequence descendible to the eldest son alone. This example was further enforced by the inconveniences that attend the splitting of estates, namely, the division of military services, the multitude of infant tenants incapable of performing any duty, the consequent weakening of the strength of the kingdom, and the inducing younger sons to take up with the business and idleness of a country life, instead of being serviceable to themselves and to the public, by engaging in mercantile, military, civil or ecclesiastical employments. These reasons occasioned an almost total change in the method of feudal inheritance on the continent of Europe; so that the eldest

1. 2 Min. Insts. 530; 2 Bl. Com. 213, 214.
(1054)

male began universally to succeed to the whole of the lands in all military tenures; and in this condition the feudal constitution was established in England by William the Conqueror.¹

Socage estates, however, are mentioned by Glanvil in the reign of Henry II, as frequently descending to all the sons equally. But in the time of Henry III, we find by Bracton that socage lands, in imitation of lands in chivalry, had almost entirely fallen into the right of succession by primogeniture, according to this third canon, except in the county of Kent, where they gloried in the preservation of their ancient *gavelkind tenure*, of which a principal incident was a joint inheritance of all the sons; and except also, in some particular manors and townships, where their local customs continued the descent, sometimes to all, sometimes to the *youngest son* only, or in other more singular methods of succession.²

The succession of females was left as by the ancient law, subject to an *equal division*; for they were all alike incapable of military service; and therefore one main reason of preferring the eldest ceasing, such preference would have been injurious to the rest; and the other principal purpose, the prevention of the too minute subdivision of estates, was left to be considered and provided for by the lords, who had the disposal of these female heiresses in marriage. However, the succession by primogeniture, even among females, took place as to the inheritance of the *crown*; wherein the necessity of a sole and determinate succession is as great in the one sex as the other. And the right of sole succession, though not of primogeniture, was also established with respect to *dignities* and titles of honor descended on females.³

§ 985. Canon IV—The Lineal Descendants in Infinitum of Any Person Deceased Shall Represent Their Ancestor; That Is, Shall Stand in the Same Place as the Person Himself, Had He Been Living.

This taking by representation is called succession *in stirpes*,

1. 2 Min. Insts. 530; 2 Bl. Com. 214, 215.

2. 2 Min. Insts. 531; 2 Bl. Com. 215, 216.

3. 2 Min. Insts. 531; 2 Bl. Com. 215, 216.

or *per stirpes*, according to the roots; since all the branches inherit the same share that their root, whom they represent, would have done. And in this manner also was the Jewish succession directed; but the Roman law somewhat differed from it. In the *descending line*, the right of representation continued *in infinitum*; and in all cases, the inheritance always descended *in stirpes*. Thus, if one of three daughters died leaving ten children, and then the father died, the two surviving daughters had each one-third of his effects, and the ten grandchildren had the remaining third divided between them; and so, if *all the daughters* had died before the father, leaving respectively ten, six, and two children, the estate would have been divided into three parts, going *per stirpes* to the offspring of each daughter.¹

But amongst *collaterals*, according to the Roman law, representation had no place, unless the persons succeeding to the inheritance were of *unequal degree*. Thus, if any person of equal degree with the persons represented were still subsisting (as if the deceased left one brother and two nephews, the sons of another brother), the succession was guided still by *the roots*; but if both brethren were dead, leaving issue, then their representatives in equal degree became themselves principals, and shared the inheritance *per capita*; that is, share and share alike; they being themselves now the next in degree to the ancestor, in their own right, and not by right of representation. So if the next heirs of J. S. be six nieces, three by one sister, two by another, one by a third, his inheritance by the Roman law was divided into six parts, and one given to each of the nieces; whereas the common law in this case would still divide it only into three parts, and distribute it *per stirpes*, thus: one-third to the three children who represent one sister, another third to the two who represent the second, and the remaining third to the one child who is the sole representative of her mother.²

The common law mode of representation is the necessary

1. 2 Min. Insts. 531; 2 Bl. Com. 217, 218.

2. 2 Min. Insts. 532; 2 Bl. Com. 217, 218; Justinian's Insts. III, i. 6. This principle has been adopted by the Virginia statute of descents, which applies it, however, to *lineals* as well as to *collaterals*. Va. Code, 1904, § 2550.

(1056)

consequence of the double preference which that law gives first to the male issue, and next to the first-born among the males, to both of which the Roman law is a stranger. For if all the children of three sisters were in England to claim *per capita*, in their own right as next of kin to the ancestor, without any respect to the stocks whence they sprung, and those children were partly male and partly female, then the eldest male among them would exclude, not only his own brethren and sisters, but all the issue of the other two daughters.³

§ 986. Canon V—On Failure of Lineal Descendants or Issue of Person Last Seised, the Inheritance Shall Descend to His Collateral Relatives, Being of the Blood of the First Purchaser, Subject to Canons II, III, and IV.

This rule, so far as it pays regard to the blood of the first purchaser, is purely of feudal original. It was entirely unknown among the Jews, Greeks, and Romans; none of whose laws looked any further than the person himself who died seised of the estate, but assigned him an heir, without considering by what title he gained it, or from what ancestor he derived it.¹

When feuds first began to be hereditary, it was made a necessary qualification of the heir who would succeed to a feud, that he should be of the blood of, that is, lineally descended from, the first feudatory or purchaser. In consequence whereof, if a vassal died seised of a feud of his own acquiring, or *feudum novum*, it could not descend to any but his own offspring; not even to his brother, because he was not descended from the first acquirer. But if it was *feudum antiquum*, that is, one descended to the vassal from his ancestors, then his brother, or such other collateral relation as was descended, and derived his blood from the first feudatory, might succeed to such inheritance. The true feudal reason for which rule was this, that what was given to a man for his personal service and personal merit ought not

3. 2 Min. Insts. 532; 2 Bl. Com. 217, et seq.

1. 2 Min. Insts. 532.

to descend to any but the heirs of his body, because it was supposed that none else would be so likely to succeed to the personal qualities which induced the original grant. And, therefore, in the feudal donation the word *heirs* extended only to the *descendants* from the first vassal, the will of the donor, or original lord, (when feuds began to turn from life estates into inheritances),² not being to make feuds absolutely hereditary, like the Roman *allodium*, but hereditary only *sub modo*; not hereditary to the *collateral* relations, or lineal ancestors, or husband or wife of the feudatory, but to the *issue descended from his body only*.³

However, in process of time, when the feudal rigor was in part abated, a method was invented to let in the collateral relations of a *grantee* to the inheritance, by granting him a *feudum novum* to hold *ut feudum antiquum*, that is, with all the qualities annexed of a feud *derived from his ancestors*, and then the collateral relations were admitted to succeed even *in infinitum*, because they might have been of the blood of, that is, descended from, the first imaginary purchaser. For since in such general grants it is not ascertained whether the feud shall be held *ut feudum paternum*, or *ut feudum maternum*, but *ut feudum antiquum* merely; that is, as a feud of *indefinite antiquity*, the law will not ascertain from which of the ancestors of the grantee the land shall be supposed to have descended; and, therefore, it admits *any* of his collateral kindred (who have the other requisites), to the inheritance, because every collateral kinsman must be descended from some one of his lineal ancestors.⁴

Of this nature are all the grants of fee simple estates in England; for there is now no such thing in law as the grant of a *feudum novum*, to be held *ut novum*, unless in case of a *fee tail*, where the rule is strictly observed, and none but the lineal descendants of the donee in tail are admitted; but every grant of lands in fee simple in England is a *feud whose antiquity is in-*

2. Ante, § 150; 2 Min. Insts. 67, 68.

3. 2 Min. Insts. 533.

4. 2 Min. Insts. 533.

definite; and, therefore, any of the collateral kindred of the grantee are capable of being called to the inheritance.

Yet, when an estate has *really descended* in a course of inheritance, the common law observes the strict feudal rule, and admits none but the heirs of those through whom the inheritance has passed; for all others have demonstrably none of the blood of the first purchaser in them.

The great and general principle, then, upon which the common law touching collateral inheritance depends is this; that upon failure of issue in the last proprietor, the estate shall descend to the blood of the first purchaser; or that it shall result back to the heirs of the body of that ancestor from whom it either really has, or is supposed by fiction of law to have, originally descended.⁵

The two remaining rules of inheritance are only rules of *evidence*, calculated to aid in investigating the question of who the purchasing ancestor was; which in feuds *vere antiquis* has in process of time been forgotten, and is supposed to be in feuds that are held *ut antiquis*. These rules may therefore be denominated *secondary canons*.⁶

§ 987. Canon VI—The Collateral Heir of Person Last Seised Must Be His Next Collateral Kinsman of the Whole Blood.

The heir must be (1) the next collateral kinsman, either personally or *jure representationis*, the proximity being reckoned according to the canonical degrees of consanguinity before mentioned;¹ and (2) he must be at common law *of the whole blood*, that is, descended not only from the same ancestor, but from the same *couple of ancestors*.²

The *total exclusion* of the half-blood from the inheritance is not so much to be considered in the light of a rule of descent, as of a *rule of evidence*; an auxiliary rule to carry into execu-

5. 2 Min. Insts. 533, 534; 2 Bl. Com. 221, et seq.

6. 2 Min. Insts. 534; 2 Bl. Com. 223, 224.

1. Ante, §§ 974, 976.

2. 2 Min. Insts. 534, 535.

tion the fifth canon, which requires that the inheritance shall continue in the blood of the *first purchaser*.³

A collateral relative of the whole blood can have no ancestors beyond or higher than the common stock, but what are equally the ancestors of the *propositus* also, and those of the *propositus* are *vice versa* his. He, therefore, is very likely to be derived from that unknown ancestor of the *propositus* from whom the inheritance descended. But a kinsman of the half-blood has but one-half of his ancestors above the common stock, the same as those of the *propositus*, and therefore there is not the same probability of that requisite of the common law, that he be derived from the *blood of the first purchaser*.⁴

This is doubtless the best reason that can be given for this exclusion of the half-blood, but it must be admitted to be very far from satisfactory. In the first place, it does not justify the peremptory and *total exclusion* of the half-blood, but only its *postponement*; and next, it neglects the obvious consideration, that there is or may be a greater probability that a nearer kinsman of the half-blood is derived from the blood of the first purchaser, than a more remote kinsman of the whole blood.⁵

§ 988. Canon VII—In Collateral Inheritances, the Male Stock Shall Be Preferred to the Female (That Is, Kindred Derived from the Male Ancestors, However Remote, Shall Be Admitted before Those Derived from the Female, However Near), unless the Land Has in Fact Descended from a Female.

This also is an auxiliary canon, or mere rule of evidence founded upon Canon V., which insists upon collateral kinsmen, in order that they may be heirs, being of the blood of the first purchaser; for if it is not known whether the inheritance came by the male or female line of ancestors, it is *probable* that it came by the *male*, because in the descending line, by Canon II,

3. 2 Min. Insts. 535.

4. 2 Min. Insts. 535; 2 Bl. Com. 224, 227, 228, n. (29).

5. 2 Min. Insts. 535; 2 Bl. Com. 227, 228, n. (29).

males are preferred to females. In the absence, therefore, of any contrary proof, the first purchaser and his blood are more likely to be found amongst the male than the female stocks.¹

1. 2 Min. Insts. 535, 536; 2 Bl. Com. 235, 236; Williams, Real Prop. 120.

(1061)

CHAPTER XXXVI.

TITLE BY DESCENT IN VIRGINIA.

- § 989. Outline of Discussion.
- 990. Origin of Virginia Statute of Descents.
- 991. Subject Matter of Descent in Virginia.
- 992. Order of Succession under the Statute—In General.
- 993. Posthumous Heirs, Lineal and Collateral.
- 994. Exceptional Case—Infant Deriving Land Gratuitously from a Parent.
- 995. The Shares of the Heirs—In General.
- 996. Collaterals of the Half-Blood.
- 997. Bastard Collaterals.
- 998. Bastards Legitimated.
- 999. Adopted Children.
- 1000. Doctrine of Hotchpot.
- 1001. Alienage of Heir.
- 1002. Alienage of Ancestor.

§ 989. Outline of Discussion.

We shall consider (1) The origin of the Virginia statute of descents; (2) The subject matter of descents in Virginia; (3) General order of succession under the statute; (4) Posthumous heirs, lineal and collateral; (5) Exceptional case of infant deriving land gratuitously from one of his parents; (6) The shares of the heirs, in general; (7) Collaterals of the half-blood; (8) Bastard collaterals; (9) Bastards legitimated; (10) Adopted children; (11) Doctrine of hotchpot; (12) Alienage of heir; (13) Alienage of ancestor.

§ 990. Origin of Virginia Statute of Descents.

From the first settlement of the colony of Virginia in 1607, down to 1st January, 1787, the common law of descent prevailed within its limits. The independence of the colony having been declared by the convention-legislature, 29th June, 1776, in October of the same year, an act was passed for a general revival of the whole code of laws. The commission for the (1062)

purpose consisted of Edmund Pendleton, George Wythe, George Mason, Thomas Ludwell Lee, and Thomas Jefferson; and Mr. Jefferson has preserved an interesting, though very brief memorial of its deliberations and action.

"We agreed to meet," says he, "at Fredericksburg, to settle the plan of operation, and to distribute the work. We met there accordingly on the 13th of January, 1777. The first question was, whether we should propose to abolish the whole existing system of laws, and prepare a new and complete institute, or preserve the general system, and only modify it to the present state of things. Mr. Pendleton, contrary to his usual disposition in favor of ancient things, was for the former proposition, in which he was joined by Mr. Lee. To this it was objected, that to abrogate our whole system would be a bold measure, and probably far beyond the views of the legislature; that they had been in the practice of revising, from time to time, the laws of the colony, omitting the expired, the repealed, and the obsolete, amending only those retained, and probably meant we should now do the same, only including the British statutes as well as our own; that to compose a new institute, like those of Justinian or Bracton, or that of Blackstone, which was the model proposed by Mr. Pendleton, would be an arduous undertaking, of vast research, of great consideration and judgment; and when reduced to a text, every word of that text, from the imperfection of human language, and its incompetence to express distinctly every shade of idea, would become a subject of question and chicanery, until settled by repeated adjudications; that this would involve us for ages in litigation, and render property uncertain, until, like the statutes of old, every word had been tried and settled by numerous decisions, and by new volumes of reports and commentaries; and that no one of us, probably, would undertake such a work, which, to be systematical, must be the work of one hand. This last was the opinion of Mr. Wythe, Mr. Mason and myself. When we proceeded to the distribution of the work, Mr. Mason excused himself, as, being no lawyer, he felt himself unqualified for the work, and he resigned soon after. Mr. Lee

(1063)

excused himself on the same ground, and died, indeed, in a short time. The other two gentlemen, therefore, and myself, divided the work among us. The common law, and statutes to the 4 James I. (when our separate legislature was established), were assigned to me; the British statutes, from that period to the present day, to Mr. Wythe; and the Virginia (colonial) laws to Mr. Pendleton. As the law of descents, and the criminal law fell, of course, within my portion, I wished the committee to settle the leading principles of these, as a guide for me in framing them; and with respect to the first I proposed to abolish the law of primogeniture, and to make real estate descendible in parcenary to the next of kin, as personal property is by the statute of distribution. Mr. Pendleton wished to preserve the right of primogeniture, but seeing at once that that could not prevail, he proposed we should adopt the Hebrew principle, and give a double portion to the elder son. I observed that, if the elder son could eat twice as much, or do double work, it might be a natural evidence of his right to a double portion; but being on a par in his powers and wants with his brothers and sisters, he should be on a par also in the partition of the patrimony; and such was the decision of the other members.

“On the subject of the criminal law, all were agreed that the punishment of death should be abolished, except for treason and murder; and that for other felonies should be substituted hard labor in the public works, and in some cases the *Lex talionis*. How this last revolting principle came to obtain our approbation, I do not remember. There remained, indeed, in our laws, a vestige of it in the single case of a slave; it was the English law in the time of the Anglo-Saxons, copied probably from the Hebrew law of ‘an eye for an eye, a tooth for a tooth’ (Exod. xxi. 24; Levit. xxiv. 20; Deut. ix. 21), and it was the law of several ancient people; but the modern mind had left it far in the rear of its advances. These points, however, being settled, we repaired to our respective homes, for the preparation of the work.

“In the execution of my part, I thought it material not to (1064)

vary the diction of the ancient statutes by modernizing it, nor to give rise to new questions by new expressions. The text of these statutes had been so fully explained and defined by numerous adjudications, as scarcely ever now to produce a question in our courts. I thought it would be useful also in all new draughts to reform the style of the later British statutes, and of our own acts of Assembly; which from their verbosity, their endless tautologies, their involutions of case within case, and parenthesis within parenthesis, and their multiplied efforts at certainty, by *said*s and *aforesaid*s, by *ors* and by *ands*, to make them more plain, are really rendered more perplexed and incomprehensible, not only to common readers, but to lawyers themselves.

"We were employed in this work from that time to February, 1779, when we met at Williamsburg; that is to say, Mr. Pendleton, Mr. Wythe and myself; and meeting day by day, we examined critically our several parts, sentence by sentence, scrutinizing and amending, until we had agreed on the whole. We then returned home, had fair copies made of our several parts, which were reported to the General Assembly, June 18, 1779, by Mr. Wythe and myself, Mr. Pendleton's residence being distant, and he having authorized us by letter to declare his approbation.

"We had in this work brought so much of the common law as it was thought necessary to alter, all the British statutes from *magna charta* to the present day; and all the laws of Virginia, from the establishment of our legislature, 4 Jac. I. (or rather from the date of the first charter of Virginia), to the present time, which we thought should be retained, within the compass of one hundred and twenty-six bills, making a printed folio of ninety pages only.

"Some bills were taken out occasionally, from time to time, and passed; but the main body of the work was not entered on by the legislature until after the general peace, in 1785, when, by the unwearied exertions of Mr. Madison, in opposition to the endless quibbles, chicaneries, perversions, vexations and delays of lawyers and demi-lawyers, most of the bills were passed by

(1065)

the legislature, with little alteration.”¹

Under these circumstances was our present statute of descents framed. Although enacted into a law in October, 1785, it took effect only from 1st January, 1787.²

It is worthy of observation, that although this statute *wholly abrogated* the common law canons of descent, and substituted therefor an entirely new system, applicable to every possible case which can happen, and governed by new analogies, yet so clear was its framer's perception of his own scheme, and so lucid his language, that no serious controversy as to its meaning arose for forty years, and the question then raised having been settled³ none of consequence has since been suggested, notwithstanding one or two sections, incorporated several years afterwards, have been the subject of repeated litigation.⁴

§ 991. Subject Matter of Descent in Virginia. .

The subject matter of descent in Virginia, as declared by the statute of descents, is “title to any real estate of inheritance,”¹ and it is entirely immaterial whether it be legal or equitable,² or whether it be an estate *in presenti* or a remainder, reversion, or executory limitation.³

Another important point to be observed in this connection is that the statute of Descents applies in every case where the owner of land in fee *dies intestate*. Hence, despite any deed or agreement by which one's children or other heirs, in the life-

1. 2 Min. Insts. 537, et seq.; 1 Jefferson, Mem. 34, et seq.

2. 2 Min. Insts. 540; 12 Hen. Stats. 138.

3. Davis v. Rowe, 6 Rand. (Va.) 363, 409, 435; 2 Min. Insts. 540.

4. 2 Min. Insts. 540; Browne v. Turberville, 2 Call (Va.) 398, 404; Templeman v. Steptoe, 1 Munf. (Va.) 339; Dilliard v. Tomlinson, 1 Munf. 183; Owen v. Cogbill, 4 Hen. & M. (Va.) 487; Liggon v. Fuqua, 6 Munf. 281. See Garland v. Harrison, 8 Leigh (Va.) 368; Hepburn v. Dundas, 13 Gratt. (Va.) 223.

1. Va. Code, 1904, § 2548; 2 Min. Insts. 540.

2. Ante, § 483; 2 Min. Insts. 227; Ratliff v. Ratliff, 102 Va. 884, 47 S. E. 1007.

3. 2 Min. Insts. 421, 451; Medley v. Medley, 81 Va. 265, 274; Waring v. Waring, 96 Va. 641, 643, 32 S. E. 150.

time of the ancestor, renounce their right to inherit the ancestor's estate, they are notwithstanding to come into the partition of the inheritance, unless the ancestor, *by his last will*, sees fit to hold them to their agreement, and disposes of his estate in a different manner.⁴

§ 992. Order of Succession under the Statute—In General.

The general principle of succession laid down by the statute is that first of all the land of a decedent shall go to his *children*, if any, or their descendants; and if there be *no children or descendants* of the decedent, then to his *nearest lineal male ancestor*; or if he be dead, to the *nearest lineal female ancestor* in the same degree and (along with her) to the *descendants* of such male and female ancestors.¹

Applying this principle more particularly, the statute enacts that "when any person having title to any real estate of inheritance shall die intestate as to such estate, it shall descend and pass in parcenary to such of his kindred, male and female, as are *not alien enemies*, in the following course:"

First, To his *children* and their descendants;

Second, If there be no child, nor the descendant of any child, then to his *father*;

Third, If there be no father, then to his *mother* and *brothers and sisters* and *their descendants*;²

Fourth, If there be no mother, brother nor sister, nor any descendant of either, then *one moiety* of the estate shall go to the *paternal*, the other to the *maternal*, kindred, in the following course;³

Fifth, First to the grandfather;

4. *Headrick v. McDowell*, 102 Va. 124, 102 Am. St. Rep. 843, 65 L. R. A. 578; *Mort v. Jones*, 105 Va. 670, 51 S. E. 220, 54 S. E. 857. See *Coffman v. Coffman*, 85 Va. 459, 2 L. R. A. 848, 17 Am. St. Rep. 69; *Cannon v. Nowell*, 51 N. C. 437; *Denson v. Antrey*, 21 Ala. 205.

1. Va. Code, 1904, § 2548.

2. *Moore v. Conner*, 2 Va. Dec. 56, 20 S. E. 936.

3. *Browne v. Turberville*, 2 Call (Va.) 390.

Sixth, If none, then to the grandmother, uncles and aunts on the *same side* and their *descendants*;

Seventh, If none such, then to the great grandfathers, or great grandfather if there be but one;

Eighth, If none, then to the great grandmothers, or great grandmother if there be but one, and the brothers and sisters of the grandfathers and grandmothers and their descendants;

Ninth, And so on, in other cases, without end, passing to the *nearest* lineal *male* ancestors and, for want of them, to the nearest lineal *female* ancestors *in the same degree* and the descendants of such male and female ancestors.

Tenth, If there be no father, mother, brother or sister, nor any descendant of either, nor any *paternal* kindred, the *whole* shall go to the *maternal* kindred; and if there be no maternal kindred the whole shall go to the paternal kindred.

Eleventh, If there be neither maternal nor paternal kindred, the whole shall go to the *husband* or the *wife* of the intestate; or if the husband or the wife be dead, to his or her *kindred* in the like course as if such husband or wife had survived the intestate, and had died entitled to the estate.⁴

Finally, if there be no husband nor wife of the intestate, nor the kindred of either, the inheritance *escheats* to the Commonwealth for the benefit of the Literary Fund for the use of the public schools.⁵

§ 993. Same—Posthumous Heirs, Lineal and Collateral.

We have seen the difficulties that might arise at common law from the vesting and divesting of estates by reason of the subsequent birth of heirs closer to the intestate than the one who had taken the estate as heir upon the intestate's death.¹

This difficulty has been in large measure removed in Virginia, or at least confined to the narrow limits of an heir born within ten months after the intestate's death, by the statute enacting that "any person *en ventre sa mere*, who may be born within

4. Va. Code, 1904, § 2548.

5. Va. Code, 1904, § 1505; 2 Min. Insts. 541, 542.

1. Ante, § 980.

ten months after the death of the intestate, shall be capable of taking by inheritance in the same manner as if he were in being at the time of such death.”²

§ 994. Same—Exceptional Case—Infant Deriving Land Gratuitously from a Parent.

If an *infant* die intestate, without issue, having title to real estate derived by *gift*, *devise* or *descent* from *one of his parents*, the *whole* shall pass to *his* kindred on the side of that *parent from whom it was derived*, if any such kindred be living at the death of the infant. If there be none such, then it shall pass to his kindred on the side of the other parent.¹

This provision mars the symmetry of the original law of descents, and comes not out of Mr. Jefferson’s “quiver of choice arrows.” It arose out of a solicitude to prevent estates going out of the families where they originally belonged, and it is the only instance where any respect is paid by the statute to the blood of the *first purchaser*. It was enacted substantially in 1790 (13 Hen. Stat. 122), and again with modifications in 1792 (1 Stats. at Large, N. S. 99), and has given occasion to most of the litigation connected with the Virginia law of descents.²

A noteworthy illustration of the application of this enactment is afforded by the case of *Vaughan v. Jones*.³ In that case the land of R, a female infant, was sold under a decree in chancery, for the purpose of partition and re-investment; and the proceeds committed to V, her guardian, upon his giving bond and security faithfully to account therefor; and in 1862, R, when she was past the age of eighteen, married B, to whom her guardian, V, paid over such proceeds; R died in 1864, still under

2. Va. Code, 1904, § 2555. See ante, § 980.

1. Va. Code, 1904, § 2556; 2 Min. Insts. 542.

2. 2 Min. Insts. 542; 1 Va. Law Reg. 229; *Browne v. Turberville*, 2 Call (Va.) 398; *Tomlinson v. Dilliard*, 3 Call 105; *Dilliard v. Tomlinson*, 1 Munf. (Va.) 183; *Templeman v. Steptoe*, 1 Munf. 339; *Addison v. Core*, 2 Munf. 279; *Liggon v. Fuqua*, 6 Munf. 281; *Davis v. Christian*, 15 Gratt. (Va.) 11, 32; *Medley v. Medley*, 81 Va. 272; *Robinson v. Robinson*, 89 Va. 916, 14 S. E. 916.

3. 23 Gratt. (Va.) 444, 458, et seq.

the age of twenty-one years, leaving a child which survived her but a few hours, and her husband, who survived the child. It was held that R having died *an infant*, the proceeds of her real estate⁴ descended as real estate to her child, subject to her husband's curtesy, and upon the death of the child passed, still as real estate, to the heirs of the child *on the part of the mother*.

It is to be observed that in order for this statute to apply five circumstances must be looked to; (1) The infant must have derived the property from one of his *parents*; it is not sufficient that he derived it from a grandfather or grandmother, etc.;⁵ (2) The infant must have derived it as a *volunteer*, without the payment of a consideration therefor, though he may have acquired it either by *gift*, *devise* or *descent*;⁶ (3) The property must have been derived from the parent *directly*, and not *indirectly*, as through a brother, etc.;⁷ (4) The infant must have remained an infant up to the time of his or her death;⁸ (5) The land is to go under the statute to the *infant's* kindred, not to the kindred of the *parent* (except individually). In other words, the *infant* is the *stirps* or root of descent, and not the parent. Hence where an infant dies without issue, and with brothers and sisters, of whom some are of the *whole blood* to him (having the same father and mother) while some are of the *half-blood* only (having only one common parent,—the one from whom the infant has derived the land by gift, devise or descent), while all these brothers and sisters are *equally related* to the common parent, and would take equally as the heirs of the *parent*, they do not, it would seem, take equally as the heirs of the *infant*, but the half-blood will take only half shares.⁹

§ 995. The Shares of the Heirs—In General.

The statute sets forth *the general rule* in the terms following:
“When the children of the intestate, or his mother, brothers

4. In pursuance of Va. Code, 1904, § 2626.

5. See 1 Va. Law Reg. 229; Va. Code, 1904, § 2556.

6. Va. Code, 1904, § 2556.

7. See 1 Va. Law Reg. 229.

8. Va. Code, § 2556.

9. See post, § 996; Talbot v. Talbot, 7 B. Mon. (Ky.) 1.

and sisters, or his grandmother, uncles and aunts, or any of his female ancestors living, with the children of his deceased lineal ancestors, male and female, in the same degree come into the partition, they shall take *per capita*, or by persons, and where a part of them being dead and a part living, the issue of those dead have right to partition, such issue shall take *per stirpes*, or by stocks, that is to say, the shares of their deceased parents; but whenever those entitled to partition are *all* in the same degree of kindred to the intestate, they shall take *per capita* or by persons."

These provisions may be paraphrased thus:

If the heirs are all in the *same degree* of relationship to the decedent, they take *per capita*, or by persons (that is, *equally*); if in *unequal degree*, the nearest take *per capita*, and the more remote take *per stirpes*, or by stocks; that is to say, the shares of their deceased ancestors, being in the degree of the nearest.¹

This was the single particular wherein the statute, as it came from Mr. Jefferson's hands, was wanting in perspicuity. As it was originally enacted, it ran thus:

"§ XIV. And where the children of the intestate, or his mother, brothers and sisters, or his grandmother, uncles and aunts, or any of his female lineal ancestors living, with the children of his deceased lineal ancestors, male and female in the same degree come into the partition, they shall take *per capita*, that is to say by persons; and where a part of them being dead, and a part living, the issue of those dead have a right to partition, such issue shall take *per stirpes*, or by stocks, that is to say, the share of their deceased parent."²

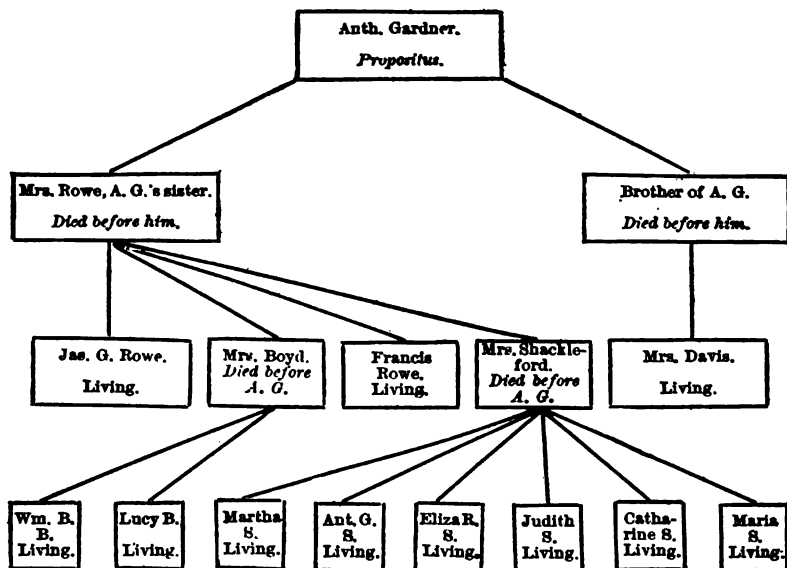
The statute in its original form, it will be observed, contemplates and provides for the case where several heirs of named classes come together to the inheritance, and *all are living*, in which case they are to take *per capita*; it also contemplates and provides for the case where some of the persons of any of the named classes are dead, whilst others are living, directing that

1. Va. Code, 1904, § 2550; 2 Min. Insts. 543; Davis v. Rowe, 6 Rand. (Va.) 355; Ball v. Ball, 27 Gratt. (Va.) 326.

2. 12 Hen. Stats. 139; 2 Min. Insts. 543.

the issue of those dead should take *per stirpes*. But unfortunately the statute did not contemplate nor specially provide for the case where *all* the individuals of any of the classes named were dead, leaving issue, and *Davis v. Rowe*³ was that case. It was as follows:

Anthony Gardner died in 1819, unmarried, leaving a large estate, real and personal, and only collateral relatives. He had had a brother and a sister, both of whom died before him, leaving children. The only child of the brother was Mrs. Davis. The sister, Mrs. Rowe, had four children, James and Francis Rowe, Mrs. Boyd and Mrs. Shackleford. Mrs. Boyd and Mrs. Shackleford also died in Anthony Gardner's lifetime; the first leaving two children, and the last six. The question was, how the estate should be divided among these eleven relations. The following diagram will best exhibit the respective claims of the parties:



Mrs. Davis insisted that the case was not provided for at all by the statute, and that being *casus omissus*, Canon IV of the

3. 6 Rand. (Va.) 355.
(1072)

common law applied, which would give her, as the representative of her father, one-half of the estate. But it was held by three judges out of five:

1st, That the statute had wholly abrogated the common law (as had been previously decided in *Browne v. Turberville*⁴ and *Templeton v. Steptoe*,⁵) and had provided a rule for *every case* which could happen.⁶

2nd, That the statute was founded on the *affections of the heart*, and follows the current in its natural flow, preferring as heirs the classes nearest in blood; and in the same class, whatever that class may be, giving to those *individuals* nearest the intestate larger portions, and allowing the more remote to take *per stirpes*; to this end (*i. e.*, to determine the shares amongst the members of a class), and to this end alone, calling the *jus representationis* to its aid.⁷

4. 2 Call (Va.) 390.

5. 1 Munf. (Va.) 339.

6. *Davis v. Rowe*, 6 Rand. (Va.) 363, et seq., 368, 409, 437, 439; 2 Min. Insts. 544.

7. *Davis v. Rowe*, 6 Rand. (Va.) 365, 419, 436, 441; 2 Min. Insts. 545. At the same time that the court laid down this important canon of interpretation of the statute it promulgated a *dictum* (for the question was not before the court) that the two children of Mrs. Boyd, deceased, would take *per stirpes* the share of their mother and that the six children of Mrs. Shackelford, deceased, would take *per stirpes* the share of their mother. This is the only case in which this aspect of the statute, as it first appeared, was touched upon, and in pronouncing the *dictum*, the court seems to have flinched somewhat from the logical conclusion of the rule of interpretation it had just laid down, as stated above in the text. If the statute was intended "to follow the current of the intestate's affections in their natural flow," it would seem that the logical interpretation of the statute, so far as *the more remote* heirs are concerned would be to construe the words "such issue shall take *per stirpes*, or by stocks, that is to say, the shares of their deceased parent" to mean that as between the nearer and the more remote, the latter shall take *per stirpes*, and not equally or *per capita* with the nearer, but that as *between themselves*, all being in equal degree, and presumably equally dear to the intestate, they shall take *per capita* equal shares of the *aggregate shares* of their deceased parents. Under this interpretation, instead of Mrs.

3rd, That the statute is to be interpreted according to the analogies of the statutes of distribution of a decedent's personal property, and of the civil law, whence this statute, as well as the statute of distributions, was in most particulars taken.⁸

4th, That the inheritance in the present case, was therefore to be divided into five equal parts, of which Mrs. Davis, J. G., and Francis Rowe, should each have one (taking *per capita*), and the other two parts should be divided respectively between the children of Mrs. Boyd and Mrs. Shackelford, who would thus take *per stirpes*, the shares of their deceased ancestors being in the degree of the nearest.

The present statute has incorporated the principal doctrine of *Davis v. Rowe* (stated above as the 2nd), into its text.⁹

§ 996. Same—Collaterals of the Half-Blood.

Persons related in the *direct line*, as father or mother and son or daughter, or grandfather and grandson, etc., can never be of the *half blood* to each other, but are always necessarily of the *whole blood*, the doctrine of the half blood relationship being confined altogether to *collaterals*. There is no such thing as a half son or a half grandson, etc., but there may be and frequently are, half brothers or sisters, half uncles or nephews,

Boyd's two children receiving each one-half of the one-fifth that would have gone to Mrs. Boyd if she had lived, and the six children of Mrs. Shackelford each receiving one-sixth of her one-fifth share, the two-fifths would have been divided into eight equal shares, of which the children of Mrs. B. and Mrs. S. would each have taken one.

The language of the statute under which *Davis v. Rowe* was decided, namely, "such issue shall take *per stirpes*, etc., the share of their deceased *parent*" seems to justify the court's *dictum*. It is perhaps significant, however, that while curing the defect in the statute, as it at first stood, pointed out in *Davis v. Rowe*, the legislature has altered the word "*parent*" to "*parents*," though another more recent *dictum* of the same sort has confirmed the interpretation of *Davis v. Rowe*. See *Moore v. Conner*, 2 Va. Dec. 56, 20 S. E. 936.

8. *Davis v. Rowe*, 6 Rand. (Va.) 368, et seq., 374, 436; 2 Min. Insts. 545.

9. Va. Code, 1904, § 2550; 2 Min. Insts. 545; *supra*, note 8. See *Ball v. Ball*, 27 Gratt. (Va.) 325.

etc. In order that a relative should be a collateral of the whole blood, it is necessary that the parties whose relationship is in question should have *both ancestors in common*; if only one of their ancestors (in the same degree) is common to both, they are of the *half blood* to each other. Thus where A and B have the same father and mother they are brothers of the whole blood; where they have separate fathers or separate mothers, the other parent being *common to both*, they are brothers of the *half blood*, or half brothers; and so it is with collaterals more remotely related, if, upon tracing back to the degree of the common ancestor, it be found that both ancestors of that degree are common, they are collaterals of the whole blood, if only one, they are collaterals of the half blood.¹

It will be remembered that the common law excluded from the inheritance altogether the collaterals of the half blood.² The Virginia statute has rectified this injustice, and does not even *postpone* them to the collaterals of the whole blood of *equal degree*, but permits them to take simultaneously with such collaterals, providing, however, justly enough, that since they have only half as much of the common blood they shall take only half as large a share.

The terms of the statute are as follows: "Collaterals of the *half blood* shall inherit only half so much as those of the whole blood. But if *all* the collaterals be of the half blood, the *ascending kindred* (if any) shall have *double portions*"³ (that is, shall have the same share as collaterals of the whole blood in the same degree would take, if there were any, or twice as much as the collaterals of the *half blood*).

Thus, in *Moore v. Conner*,⁴ the intestate's relatives were his mother and four nephews and nieces of the *half blood* (children of three deceased brothers of the half blood). The court held that the property was to be divided into five parts, three of which should be divided among the collaterals of the half blood

1. Ante, § 987; 2 Min. Insts. 534, 535.

2. Ante, § 987.

3. Va. Code, 1904, § 2549.

4. 2 Va. Dec. 56, 20 S. E. 936.

and that the mother (the ascending kindred) should take a double portion, that is, two-fifths. The claim in this case was made by the sole child of one of the brothers that the children of the brothers were entitled to share *per capita* with the mother.⁵

In *Blunt v. Gee*,⁶ the heirs of the intestate were his mother, two sisters of the *whole blood* and a brother of the *half blood*. The property was divided into seven parts, of which the mother took two, the sisters two each, and the half brother one.

If an *infant* die intestate and without issue seised of land derived by descent or devise from his father, who has been twice married and has left children by both marriages, though the statute enacts, as we have seen, that the land shall descend to his kindred *on the side of that parent* from whom he derived it,⁷ and though *on the father's side* all of these brothers would be *equally related* to the infant decedent, yet since he, and not his father is the *stirps* or root of descent, and since some of the brothers are only related in the *half blood to him*, it would seem they should take only half-shares.⁸ As between brothers and sisters, the descent is *immediate*, and not through the father.⁹

§ 997. Same—Bastard Collaterals.

At common law, a bastard is *filius nullius*, being recognized in law neither as the child of the *father* nor of the *mother*, and, being in law of the blood of neither, has no inheritable blood that will permit him to inherit from or through either or to transmit inheritance to or through either.¹

In Virginia, however, it being justly considered that no good reason can exist for doubting the *maternity* of a bastard any more than of a legitimate child, however it may be with regard

5. The question mooted, ante, § 995, note 8, was not raised nor considered in this case.

6. 5 Call (Va.) 481.

7. Va. Code, 1904, § 2556; ante, § 994.

8. *Talbot v. Talbot*, 7 B. Mon. (Ky.) 1.

9. Post, § 1002; 2 Min. Insts. 546; *Godfrey v. Dixon*, Cro. (Jac.) 539; *Collingwood v. Pace*, 1 Lev. 60.

1. 2 Min. Insts. 555; 2 Bl. Com. 247.

to the *paternity*, the statute enacts that “bastards shall be capable of *inheriting* and *transmitting inheritance on the part of their mother*, as if lawfully begotten.”²

Under this statute, the *mother* of a bastard is the only parent recognized by the law, but she is as fully recognized as if the bastard were legitimate. Not only may he *inherit from*, and *transmit inheritance to*, his mother, but he may do the same from or to any person related to him *on the part of the mother*, as if he were lawfully begotten. Hence, he is in law the *brother* of any other son of the *mother*, whether bastard or legitimate, by the same or another father. But since, in Virginia as well as at common law, his *father* is unknown (in law), he must necessarily be regarded as of the *half blood only* to other children of his mother, though in fact all have the same father, so that a bastard, in respect to collaterals, is always a collateral of the *half blood*, and as such takes only a *half portion*; and reciprocally, all his collateral relatives (on the part of the *mother*) are related to him in the half blood.³

Thus, in *Garland v. Harrison*,⁴ a bastard son, seised of land, died without issue, leaving a mother and two bastard brothers by other fathers as his heirs, and his land was divided into four parts, one of which went to each of the bastard brothers, as collaterals of the half blood on the part of the *mother*, and two parts went to the mother (the ascending kindred).

§ 998. Same—Bastards Legitimated.

If one who is born a bastard, or who would have answered that description at common law, is *legitimated*, the result is the same as if he had been born or begotten in lawful wedlock, and he may inherit and transmit inheritance on his father's side as

2. Va. Code, 1904, § 2552. See 8 Va. Law Reg. 514.

3. Ante, § 996; Va. Code, 1904, § 2549; *Garland v. Harrison*, 8 Leigh (Va.) 368, 379; *Hepburn v. Dundas*, 13 Gratt. (Va.) 223; *Moore v. Conner*, 2 Va. Dec. 56, 20 S. E. 940; *Bennett v. Toler*, 15 Gratt. 588, 78 Am. Dec. 638.

4. 8 Leigh (Va.) 368.

well as on his mother's. He ceases to be a bastard.¹

This legitimation may occur in two ways; (1) by narrowing the common law definition of a bastard, so as to make persons legitimate, who at common law would have been born bastards; and (2) by permitting the legitimation of one born a bastard under the Virginia law.

With regard to the first, there are two statutes in Virginia, that bear upon the case.

The *first* of these declares that "the issue of marriages, deemed *null* in law, or *dissolved* by a court, shall nevertheless be legitimate."² Thus, the issue of a bigamous marriage, though it is absolutely *void per se*, are nevertheless legitimate, and therefore may inherit from their *father* as well as their mother.³

The *second* statute, in this connection, provides that "the children of parents, one or both of whom were *slaves* at and during the period of cohabitation, and who were recognized by the father as his children, *and* whose mother was recognized by such father as his wife, and was cohabited with as such, and *their descendants*, shall be as capable of inheriting any estate whereof such father may have died seised or possessed, or to which he was entitled, as though such children had been born in lawful wedlock,"⁴ and if cohabiting together as husband and wife when slaves, they are to be deemed husband and wife, and their issue shall be deemed *legitimate*, whether born before or after that period.⁵

With regard to the second method of legitimating bastards,

1. Rice v. Efford, 3 Hen. & M. (Va.) 225; Sleigh v. Strider, 5 Call (Va.) 439; Stones v. Keeling, 5 Call 143; Ash v. Way, 2 Gratt. (Va.) 203; Heckert v. Hile, 90 Va. 390, 18 S. E. 841.

2. Va. Code, 1904, § 2554.

3. Stones v. Keeling, 5 Call (Va.) 143; Heckert v. Hile, 90 Va. 390, 18 S. E. 841. See Greenhow v. James, 80 Va. 636, 56 Am. Rep. 603.

4. Va. Code, 1904, § 2552.

5. Va. Code, 1904, § 2227. See Francis v. Francis, 31 Gratt. (Va.) 283; Womack v. Tankersley, 78 Va. 242; Fitchett v. Smith, 78 Va. 524, 527; Smith v. Perry, 80 Va. 563; Scott v. Raub, 88 Va. 724, 729, 14 S. E. 178; Patterson v. Bingham, 101 Va. 372, 43 S. E. 609.

(1078)

namely, by some subsequent act, it is not sufficient in Virginia that the father should acknowledge the child as his, nor is an intermarriage of the parents sufficient, standing alone. The statute requires both of these acts, providing that "if a man, having had a child or children by a woman, shall afterwards intermarry with her, such child or children, or their descendants, if *recognized* by him *before* or *after* the marriage, shall be deemed legitimate."⁶ In construing this statute, it has been held, that it is immaterial whether the child be *living* or *dead* at the time of the marriage or of the acknowledgment—at least, if the dead child has left *descendants*. Thus, a bastard, who died before the marriage of the parents, leaving a legitimate child, was held to have been legitimated upon the marriage of the parents and his recognition by the father, so that his child might take as heir to the father.⁷

§ 999. Same—Adopted Children.

Provision has been made in Virginia of recent years by statute for the adoption of a *minor child*, and also of an *adult*, through a judicial proceeding, by an *unmarried resident* of Virginia or a *husband and wife jointly*, with the *written* consent of the child himself, if he be fourteen years old, and that of the *parent or guardian*, or a similar assent on the part of the *adult adoptee*. And upon the decree of adoption, the natural parents shall be divested of all legal rights and obligations in respect of such child, and *vice versa*. Such child (or adult), says the statute, shall be, *to all intents and purposes*, the child and *heir at law* of the person so adopting him, entitled to all the rights and privileges, and subject to all the obligations of a child of such person begotten in lawful wedlock; but on the decease of such person, and the subsequent decease of such adopted child (or adult) *without issue*, the property of such adopted parent,

6. Va. Code, 1904, § 2553; *Rice v. Efford*, 3 Hen. & M. (Va.) 225; *Sleigh v. Strider*, 5 Call (Va.) 439; *Ash v. Way*, 2 Gratt. (Va.) 203. See *Greenhow v. James*, 80 Va. 636, 56 Am. Rep. 603; *Bennett v. Toler*, 15 Gratt. 588, 623, 78 Am. Dec. 638.

7. *Ash v. Way*, 2 Gratt. (Va.) 203.

still undisposed of, shall descend to such *parents' next of kin*, and not to the next of kin of such adopted child¹ (or adult).

The statute just quoted settles beyond dispute the right of the adopted child to inherit the property of the adopting parent himself, but it leaves in some doubt the question whether he can also inherit from the *collateral* relatives of the adopting parent, and whether he can *transmit inheritance* either to the *adopting parent* himself or to the latter's *collateral* relatives or lineal descendants.

§ 1000. Doctrine of Hotchpot.

The origin and nature of the doctrine of hotchpot, and the leading principles applicable thereto, have been already treated in connection with estates in coparcenary.¹ It will suffice here merely to repeat the terms of the statute.

"Where any *descendant* of a person dying intestate as to his estate, or any *part* thereof, shall have received *from such intestate* in his lifetime, or *under his will*, any estate, *real or personal*, by way of *advancement*, and he, or any *descendant* of his, shall come into the *partition and distribution* of the estate with the other parceners and distributees, such advancement shall be brought *into hotchpot* with the whole estate, *real and personal*, descended or distributable, and thereupon such party shall be entitled to his proper portion of the estate, *real and personal*."²

§ 1001. Alienage of Heir.

While, at common law, the alienage of the heir rendered him incapable of inheriting land,¹ this doctrine has been greatly

1. Va. Code, 1904, § 2614 a; Acts, 1906, p. 310. And as to *adult* adoptees (though not *infants*) it is expressly provided that no property which by any deed, will or other *writing*, would go to the child or heir of the person so adopting shall go to the adopted adult, unless the *absolute fee simple* be first vested in the adopting parent. Acts, 1906, p. 310.

1. Ante, § 948, et seq.; 2 Min. Insts. 512, et seq.

2. Va. Code, 1904, § 2561.

1. Ante, § 967; 2 Min. Insts. 546.

modified in Virginia, and indeed abolished, except in the case of *alien enemies*, whom the statute of Descents itself declares incapable of taking as heirs,² it being also enacted affirmatively that "any alien, *not an enemy*, may acquire by purchase or descent and hold real estate in this state; and the same may be *transmitted* in the same manner as real estate held by a citizen."³

§ 1002. Alienage of Ancestor.

The common-law principle that aliens could not inherit or otherwise acquire land was extended so as not to permit them even to be the conduit through which lands might be transmitted by inheritance from one natural born subject to another. Hence it was held by Sir Edward Coke, not without some show of reason, that if an alien cometh into England, and there hath issue two sons, who are thereby natural-born subjects, and one of them purchase lands in fee, and dieth without issue, his brother shall not be his heir; for there was never any inheritable blood between the father and them.¹ And although this particular application of the principle, as *between brothers*, has been since overruled,² yet it was upon the ground that descent between brothers is *immediate*, and not through the father; so that in other cases, the alienage of an ancestor through whom the kindred must be derived did still operate at common law to preclude one subject from inheriting of another.³

In order, therefore, to obviate a principle logical enough, but leading to harsh results not warranted by sound policy, the statute 11 & 12 Wm. III, c. 6, was enacted, to the effect that alienage of the ancestor through whom one derives his pedigree shall be no bar to his making his title by descent.⁴

This statute has been in substance adopted in Virginia, it be-

2. Va. Code, 1904, § 2548; ante, § 992.

3. Va. Code, 1904, § 43; 2 Min. Insts. 546.

1. 2 Th. Co. Lit. 191; 2 Min. Insts. 546.

2. *Godfrey v. Dixon*, Cro. (Jac.) 539; *Collingwood v. Pace*, 1 Lev. 60.

3. 2 Min. Insts. 546.

4. 2 Min. Insts. 546; 2 Bl. Com. 249, et seq.

ing enacted that "In making title by descent, it shall be no bar to a party that any ancestor (whether *living* or *dead*), through whom he derives his descent from the intestate, is or hath been an alien."⁵

5. Va. Code, 1904, § 2551. See 12 Hen. Stats. 139; *Jackson v. Sanders*, 2 Leigh (Va.) 109; 2 Min. Insts. 546.

(1082)

PART II.

TITLE BY PURCHASE.

§ 1003. Preliminary Outline of Discussion.

§ 1003. Preliminary Outline of Discussion.

Many and various are the forms of *purchase* by which one may acquire the legal or equitable title to real property, using the word "purchase" in the technical sense, before explained,¹ as embracing all the modes of acquiring property by the *act or agreement of the parties*, in contradistinction to title acquired by *mere operation of law*. Thus, "purchase" stands in direct opposition to *descent* (as well as dower, curtesy and escheat, all of which arise to a greater or less extent by operation of *law*), and includes every other method of coming to an estate, as by gift, devise, adverse possession, occupancy, etc., as well as by *conveyance for value*.²

In the course of the discussion, we shall examine the following sources of title: (1) Title by occupancy; (2) Title by accretion; (3) By adverse possession of land under the statute of limitations; (4) By prescription; (5) By conveyance; (6) By devise; (7) By contract to convey; (8) Under the exercise of a power of appointment; (9) By estoppel; (10) By dedication; (11) By tax sale; and (12) The registry of title.

1. Ante, § 966.

2. 2 Min. Insts. 547; 2 Bl. Com. 241; 2 Th. Co. Lit. 184.

CHAPTER XXXVII.

TITLE BY OCCUPANCY.

§ 1004. Outline of Discussion.

1005. Nature of Title by Occupancy.

1006. Occupancy at Common Law either General (or Common) or Special.

1007. No General Occupancy of Incorporeal Hereditaments.

1008. General and Special Occupancy in Virginia.

§ 1004. Outline of Discussion.

This mode of acquiring real property will be considered under the following heads: (1) Nature of title by occupancy; (2) Occupancy at common law either *general* (or common) or *special*; (3) No general occupancy of *incorporeal* hereditaments; (4) General and special occupancy abolished in Virginia.

§ 1005. Nature of Title by Occupancy.

Title by occupancy arises from the actual taking of possession of property which before belonged to no one, although capable of being appropriated. It may be expected that instances of such title will, in any well-ordered state, be very rare, for as it cannot but be unpropitious to the general tranquillity of society to have in its midst subjects of property liable to be seized by the first taker, pains will generally be used to appoint by law a definite owner for every such subject. Accordingly, the right of occupancy, so far as it concerns real property, is confined by the common law, within a very narrow compass, and by statutes, as well in Virginia as in England, has become well nigh, if not totally, extinct.¹

The common law extends the right by occupancy to *but a single instance*, namely, where a man is tenant *pur autre vie*, (by a grant to him for the life of another), and dies during the *life of cestui que vie*; that is, of him for whose life the land is

1. 2 Min. Insts. 560; 2 Bl. Com. 258.
(1084)

holden; in this case he that can first enter into the land may, by right of occupancy, lawfully retain the possession, so long as *cestui que vie* lives. For it does not revert to the grantor, who cannot claim against his own deed; it does not escheat to the lord, for all escheats are of the entire fee simple, and not of particular estates carved out of it; it does not belong to the grantee, because he is dead; nor does it descend to his heirs, because it is not an estate of inheritance; nor vest in his personal representatives, for personal representatives never succeed to a *feehold*. Belonging, therefore, to nobody, the common law leaves it open to be seized and appropriated by the first person that can enter upon it, during the life of *cestui que vie*, under the name of an *occupant*.²

§ 1006. Occupancy at Common Law either General (or Common) or Special.

There are at common law two species of occupancy; (1) *general* or *common* occupancy; and (2) *special* occupancy.

Where an estate *pur auter vie* is not limited to the *grantee's* *heirs* (e. g., grant to A, for life of Z), and the grantee dies, living the *cestui qui vie*, any person who can first get possession of the land, after the death of the tenant, is entitled to hold it during the *cestui que vie's* life, by *common* or *general* occupancy.¹

Where an estate *pur auter vie* is limited to the grantee *and his heirs* (e. g., grant to A and his heirs for life of Z), and the grantee dies, living Z, the heir of the tenant (in order to avoid the mischiefs incident to common occupancy) is allowed, at common law, to enter and hold possession, not, indeed, as *heir* (for the estate is not one of inheritance), but as *special occupant*.²

§ 1007. No General Occupancy of Incorporeal Hereditaments.

It is worthy of observation that at common law there can

2. 2 Min. Insts. 560; 1 Lom. Dig. 55; 2 Bl. Com. 258, 259.

1. 2 Min. Insts. 561; 2 Bl. Com. 259; 1 Lom. Dig. 55.

2. 2 Min. Insts. 561; 2 Bl. Com. 259; 1 Lom. Dig. 55.

be no *common* occupancy of incorporeal hereditaments, such as rents, commons and the like, because such subjects admitted of no *actual entry* or corporal seisin. And therefore, where a rent was granted to A during the life of B, and A died, living B, the rent was held to be entirely determined. For the grant being made to A only, when he died no one could claim it as occupant, because there could be no entry upon it; nor could any claim it under the deed, because it was limited to the grantee only. And so as no one could take it under the grant, the rent ceased.¹

But if the rent had been granted to A *and his heirs*, during the life of B, and A died, living B, his heirs would take as *special occupants*; for though in point of property the rent is not capable of occupation, yet since the heirs were expressly included in the grant, and they are capable of taking the freehold as representatives of the grantee, it is but reason that the rent should not determine while any person comprised in the grant is capable of taking.²

And in Virginia, even in the first case mentioned, under the statute providing that "*any estate for the life of another shall go to the personal representative of the party entitled to the estate,*" etc.,³ there is no occasion for the rent or other incorporeal hereditament to cease upon the death of the person entitled, but it would go to his personal representative, to be dealt with as *personal estate* of the decedent.

§ 1008. General and Special Occupancy in Virginia.

The Virginia statute, in pursuance of the general policy of the English statutes, 29 Car. II, c. 3 and 14 Geo. II, c. 20, as well as some later acts of Parliament,¹ enacts that "*any estate*

1. 2 Min. Insts. 561; 1 Lom. Dig. 55; Bac. Abr. Estate for Life (B), 3; Bowles v. Poore, Cro. (Jac.) 282; Hassell v. Gowthwaite, Willes, 505; Rawlinson v. Duchess of Montague, 3 P. Wms. 264, n. (D); Bearpark v. Hutchinson, 7 Bing. 178.

2. 2 Min. Insts. 562; 1 Lom. Dig. 55; Bac. Abr. Estate for Life, (B), 3; Bowles v. Poore, Cro. (Jac.) 282.

3. Va. Code, 1904, § 2653; post, § 1008.

1. 2 Min. Insts. 561; Williams, Real Prop. 21, 30; 2 Bl. Com. 254, et seq.

for the life of another shall go to the *personal representative* of the party entitled to the estate, and be assets in his hands, and be applied and distributed as the personal estate of such party.²

The question presents itself whether this statute is to be construed as abolishing *special*, as well as general, occupancy, as where a rent is granted to A *and his heirs* for the life of B, and A dies, living B. This point seems to be pretty well settled in favor of the application of the statute, and of the personal representative of the grantee for life, because it is within the terms of the statute, being in *common parlance* at least, a case of special occupancy, and such construction is moreover more consistent with the spirit and intention of the statute.³

And a similar question arises in a case of special occupancy of *lands*, namely, when a grant of lands is made to A *and his heirs*, for the life of B, and A dies, living B. In this case also it is supposed that the spirit and intention of the statute must be invoked, and that the land would be vested in the personal representatives of A, and not in his heirs.⁴

2. Va. Code, 1904, § 2653; 2 Min. Insts. 561; 1 Lom. Dig. 56, et seq.

3. 2 Min. Insts. 562; 1 Lom. Dig. 57; *Bearpark v. Hutchinson*, 7 Bing. 178; *Rawlinson v. Duchess of Montague*, 3 P. Wms. 265, n. (D); *Hassell v. Gowthwaite*, Willes, 505.

4. 2 Min. Insts. 562; 2 Bl. Com. 260; 1 Lom. Dig. 55, 57; and cases cited *supra*, note 3.

(1087)

2 Min. Real Prop—4

CHAPTER XXXVIII.

TITLE BY ACCRETION.

- § 1009. Outline of Discussion.
- 1010. Various Sorts of Accretion.
- 1011. Title by Accretion Generally.
- 1012. Title by Alluvion and Reliction.
- 1013. Same—Apportionment of Alluvion.
- 1014. Avulsion.
- 1015. Islands Newly Formed.

§ 1009. Outline of Discussion.

We are to consider (1) The various sorts of accretion; (2) Title by accretion generally; (3) Title by alluvion and reliction; (4) Avulsion; (5) Islands newly formed.

§ 1010. Various Sorts of Accretion.

An *accretion* is an addition to land already held by an owner, caused by the action or erosion of water, producing changes of the water line more or less rapid, ranging from the imperceptible additions of alluvial deposits to the changes made in a night by flood or freshet, resulting in a river cutting out for itself a new bed, or the sweeping away of a considerable body of land intact by a powerful current or eddy.

There are at least four cases of such changes wrought by the action of water, which the law recognizes, namely, the four heads last enumerated in the preceding section.

When the change is a *very gradual one*, and is caused by the addition of soil to the existing land, deposited by the water, it is known as *alluvion*; and if such increase of the land is due to the *gradual shrinking away* of the water, it is known as *reliction* or *dereliction*.¹

On the other hand, if the change is *sudden*, as in case of a flood or freshet, and the *identity of the land* remains, notwith-

1. Post, § 1012.
(1088)

standing its changed boundaries or altered location, this is known as *avulsion*, and gives rise to no change in ownership.²

If the change is not sudden, nor yet so gradual and imperceptible as to make it a case of alluvion or reliction, it is generally known by the generic name of *accretion*, and is governed by other principles than are applied in either of the first two cases.³ The case of *islands newly formed* usually belongs to this class of accretions, though not always.⁴

§ 1011. Title by Accretion Generally.

If the increment be not sudden and capable of identification, on the one hand, nor yet so gradual and imperceptible as to constitute *alluvion* or *reliction*, on the other, the general rule is that the increment belongs to the *owner of the bed* of the stream or water in which it is formed. In *public* (that is *navigable*) waters, including at common law the sea, and all waters in which the tide ebbs and flows, and in the United States all waters which are actually navigable for vessels employed in commerce, say those of twenty tons burden and upwards, the commonwealth, or in England the crown, is the proprietor of the bed, and therefore to the commonwealth (or in case of the *open sea*, in close proximity to the coast, perhaps *to the United States*), and in England to the crown, belong such accessions. In *private* waters, on the other hand, the bed belongs to one or other, or to both, of the adjacent riparian proprietors, and such accessions belong to him.¹

2. Post, § 1014.

3. Post, § 1011.

4. Post, § 1015.

1. Ante, § 58; 2 Min. Insts. 20, et seq., 563; 2 Bl. Com. 261, et seq., n. (6); 1 Lom. Dig. 661, et seq.; 3 Kent, Com. 428. See *Hayes v. Bowman*, 1 Rand. (Va.) 417; *Meade v. Haynes*, 3 Rand. 33; *Home v. Richards*, 4 Call (Va.) 441, 2 Am. Dec. 574; *Crenshaw v. Slate River Co.*, 6 Rand. 245; *The King v. Lord Yarborough*, 3 B. & Cr. 91; *Scratten v. Brown*, 4 B. & Cr. 485; *In re Hull, etc., Railway*, 5 M. & W. 331; *Abbot of Ramsay's Case*, 3 Dy. 326b; *The King v. Smith*, 2 Dougl. 444; *People v. Kirk*, 162 Ill. 138, 53 Am. St. Rep. 289, note; *Coulthard v. Stevens*, 84 Ia. 241, 32 Am. St. Rep. 307, note.

§ 1012. Title by Alluvion and Reliction.

Alluvion is the *gradual and imperceptible* increase of land annexed to the shore of the sea or any other water, and the doctrine applicable thereto, as well as to the corresponding case of land left bare by the gradual and imperceptible receding or *reliction* of the water, is that the soil belongs to the proprietor of the adjacent land which is thus extended. In order that this doctrine may prevail, the gain, whether by *alluvion* or by *reliction*, must be by little and little, by small and imperceptible degrees; *i. e.* by a progress not perceptible. For *de minimis lex non curat*, and besides these riparian owners being often losers by the breaking in or incursions of the water, or at charges to keep it out, this possible gain is therefore a reciprocal consideration for such possible loss or charge.¹ And the fact that the riparian owner who claims the accretion is a *corporation* does not prevent the title by alluvion from arising.²

Thus, if a private stream, bounded on both sides by land belonging to A (who would therefore own also the bed of the stream) should very gradually change its course so as to encroach on land belonging to B, the land thus covered by the stream in its new bed ceases to belong to B, and becomes the property of A.³ And so, if A should own only one side of the stream, which would bring his boundary to the middle of the stream,⁴ the middle line of the stream remains the boundary, though such middle line itself changes as a result of the change in the stream's location.⁵

1. 2 Min. Insts. 563; 2 Tiffany, Real Prop., § 453; Gould, Waters, § 155; *In re Hull, etc., Railway*, 5 M. & W. 327; *Chesapeake & O. R. Co. v. Walker*, 100 Va. 82, 40 S. E. 633, 914; *East Hampton v. Kirk*, 84 N. Y. 218; *Cox v. Arnold*, 129 Mo. 337, 50 Am. St. Rep. 450; *Warren v. Chambers*, 25 Ark. 120, 4 Am. Rep. 23; *Hagan v. Campbell*, 8 Porter (Ala.) 9, 33 Am. Dec. 277, et seq., note.

2. *Chesapeake & O. R. Co. v. Walker*, 100 Va. 82, et seq., 40 S. E. 633, 914.

3. 2 Tiffany, Real Prop., § 453; *Foster v. Wright*, 4 C. P. Div. 438; *Welles v. Bailey*, 55 Conn. 292, 3 Am. St. Rep. 48.

4. Ante, §§ 58, 59, 60.

5. *Nebraska v. Iowa*, 143 U. S. 359; *Welles v. Bailey*, 55 Conn. (1090)

It is worthy of note that the title to such accretion is subject to any incumbrances or rights of third parties to which the original land to which it has attached itself is subject, such as a lien, an easement or an outstanding lease.⁶ So, if the statute of limitations has partially run against the owner's right to recover his original land, his right to recover the alluvion dies with the right to recover the former.⁷

1013. Same—Apportionment of Alluvion.

Where there are several contiguous riparian proprietors, and the alluvion (or reliction) is formed along the entire shore line, the general and better rule seems to be that, in order to ascertain the respective proportions of the new land accruing to each owner, the *new shore line* should be divided between or among them in proportion to the length of their old water fronts, and that the points of division of the new frontage should then be connected by straight lines with the *termini* of the old water fronts, these straight lines constituting the *lateral* boundary lines of the several owners as respects the alluvion.¹

§ 1014. Avulsion.

In the case of *avulsion*, when land is added by some *sudden* action of the water, such as a sudden change of the course of the stream, or the violent tearing away of a body of land from

292, 3 Am. St. Rep. 48; *Gerrish v. Clough*, 48 N. H. 9; *Niehaus v. Shepherd*, 26 Ohio St. 40.

6. *Cobb v. Lavalle*, 89 Ill. 331, 31 Am. Rep. 91; *Town of Freedom v. Norris*, 128 Ind. 377; *People v. Lambier*, 5 Denio (N. Y.) 9, 47 Am. Dec. 273; *Williams v. Baker*, 41 Md. 523.

7. 2 *Tiffany*, Real Prop., § 453; *Bellefontaine Imp. Co. v. Niedringhaus*, 181 Ill. 426, 72 Am. St. Rep. 269; *Beune v. Miller*, 149 Mo. 228.

1. 2 *Tiffany*, Real Prop., § 454; *Johnston v. Jones*, 1 Black 209; *Inhabitants of Deerfield v. Arms*, 17 Pick. (Mass.) 41; *Batchelder v. Keniston*, 51 N. H. 496, 12 Am. Rep. 143. See *Mulry v. Norton*, 100 N. Y. 424, 53 Am. Rep. 206. But the application of this rule may be subject to modification in a particular case in view of peculiar circumstances. See *Batchelder v. Keniston*, *supra*; *Thornton v. Grant*, 10 R. I. 477, 14 Am. Rep. 701; *Kehr v. Snyder*, 114 Ill. 313, 55 Am. Rep. 866.

(1091)

its old position and lodging it in a new, the circumstances being such that the land continues to be capable of identification, there is no change of ownership at all.¹

Thus, if the mid-line of a stream is the boundary line between A and B, a *sudden* change in the location of the stream, and a shifting of the middle line, will not affect the boundary which remains at the old line.²

§ 1015. Islands Newly Formed.

The same distinction is to be noted here as in the case of accretions between islands created by *avulsion* and by a more *slow and gradual* process.

If the island be formed by a *sudden* change in the course of a stream or its division into two beds, or by a sudden encroachment of the sea, etc., the soil remaining capable of identification as before, the ownership of the land does not change.¹

But if the island be not so formed, but arises by a *gradual* process, *howsoever slow and imperceptible*, the island thus formed belongs to the *owner of the bed* of the stream, not to the riparian proprietors, unless they happen to own the bed upon which it is formed. If it be a *public*, or *navigable*, water, the water belongs to *the public*, and the new island follows the ownership of the *bed*. If the water be *private*, the bed is usually private also and belongs to the riparian owner or owners.²

1. St. Louis v. Rutz, 138 U. S. 226; Nebraska v. Iowa, 143 U. S. 359; Vogelsmeier v. Prendergast, 137 Mo. 271; Coulthard v. Davis, 101 Ia. 625; Lynch v. Allen, 20 N. C. 62, 32 Am. Dec. 672.

2. 2 Tiffany, Real Prop., § 453; Butternuth v. Bridge Co., 123 Ill. 535, 5 Am. St. Rep. 545; Rees v. McDaniel, 115 Mo. 145; Bouvier v. Stricklett, 40 Neb. 792.

1. 2 Tiffany, Real Prop., § 455; Gould, Waters, § 166; Trustees of Hopkins Academy v. Dickinson, 9 Cush. (Mass.) 544; Bonewits v. Wygant, 75 Ind. 41.

2. Ante, § 58; 2 Min. Insts. 564; 3 Kent, Com. 428; St. Louis v. Rutz, 138 U. S. 226; Mulry v. Norton, 100 N. Y. 426, 53 Am. Rep. 212; Trustees of Hopkins Academy v. Dickinson, 9 Cush. (Mass.) 548; Perkins v. Adams, 132 Mo. 131; Cox v. Arnold, 129 Mo. 337, 50 Am. St. Rep. 450; McCullough v. Wall, 4 Rich. L. (S. C.) 68, 53 Am. Dec. (1092)

If the two banks of a private stream belong to different proprietors, since each as a general rule owns the bed to the middle line of the stream, an island formed in such a position that the *filum fluminis* runs through it, will belong in part to one riparian owner and in part to the other, the dividing line being the prolongation of the *filum fluminis*.³ If the island be entirely on one side of the *filum fluminis*, it belongs altogether to the riparian owner who owns that side of the bed.

It would seem logically to follow, the middle of the stream dividing the lands of the opposite proprietors, that upon the creation of such an island the *filum fluminis* would shift, and thus the party owning the island would incidentally shove forward his boundary line. And if we suppose the operation repeated and new islands arising from time to time on the far side of the first, it might happen that these also would belong to the owner of the first, though they actually arise on the far side of the *original* boundary line.⁴

715; Hagan v. Campbell, 8 Porter (Ala.) 9, 33 Am. Dec. 280, note; Bellefontaine Imp. Co. v. Niedringhaus, 181 Ill. 426, 72 Am. St. Rep. 280, note.

3. 3 Kent, Com. 428; Trustees of Hopkins Academy v. Dickinson, 9 Cush. (Mass.) 548; Hagan v. Campbell, 8 Porter (Ala.) 9, 33 Am. Dec. 280, note.

4. Hagan v. Campbell, 8 Porter (Ala.) 9, 33 Am. Dec. 280, note.

(1093)

CHAPTER XXXIX.

TITLE BY ADVERSE POSSESSION UNDER STATUTE OF LIMITATIONS.

- § 1016. Outline of Discussion.
- 1017. Origin of Statutes of Limitation as Applicable to the Recovery of Land.
- 1018. "Continual Claim" as Prolonging the Period of Limitation.
- 1019. Common-Law Doctrine That "Descent Tolls Entry."
- 1020. Period of Adverse Possession Prescribed by Virginia Statute of Limitations.
- 1021. Statute of Limitations a Source of Legal Title to Adverse Occupant as Well as a Bar to the Claimant.
- 1022. Disabilities of Claimant as Prolonging the Statutory Period.
- 1023. Same—Tacking of Disabilities.
- 1024. Nullum Tempus Occurrit Regi.
- 1025. Nature of Occupant's Possession in General.
- 1026. Duration of Occupant's Possession.
- 1027. Continuity of Occupant's Possession.
- 1028. Tacking of the Possession of One Occupant to That of Another.
 - 1029. 1. Death of First Occupant.
 - 1030. 2. Transfer by First Occupant.
 - 1031. 3. Disseisin of First Occupant.
- 1032. Fraudulent Possession of Occupant.
- 1033. Notoriousness of Occupant's Possession.
- 1034. Exclusiveness of Occupant's Possession.
- 1035. Hostile Character of Occupant's Possession.
- 1036. Same—Occupation Through Mistake as to Boundaries.
- 1037. Adverse Possession Negatived in Certain Cases—Enumeration.
- 1038. 1. Where the Parties Claim under the Same Title.
- 1039. 2. Where the Possession of Occupant Is Consistent with Claimant's Title.
- 1040. 3. Where Occupant Has Acknowledged Claimant's Title.
- 1041. Actual and Constructive Possession of Occupant under Color of Title.
 - I. General Common-Law Doctrine.
- 1042. II. Doctrine under Virginia Statute.
- 1043. 1. Adverse Possession under Claim of Right, but without Color of Title.

(1094)

- § 1044. 2. Two Purely Constructive Possessions under Color of Title.
- 1045. 3. Junior Grantee in Actual Occupancy Outside (but Not Inside) the Interlock.
- 1046. 4. Both Senior and Junior Grantees in Actual Occupancy of Part of the Interlock.
- 1047. 5. Junior Grantee in Actual Possession of Part of Interlock; Senior Not in Actual Possession of Any Part of His Tract.
- 1048. 6. Junior Grantee in Actual Possession of Part of Interlock; Senior in Actual Possession of Part of His Tract Outside the Interlock.
- 1049. Effect of Acquisition of a New Right by the Rightful Claimant.
- 1050. Nature of Claimant's Entry in Order to Oust an Adverse Occupant.
- 1051. Application of Statute of Limitations to Lands in Equity—In General.
- 1052. Cases of Trust in Equity Not within the Statute of Limitations.
- 1053. Cases of Fraud in Equity Not within the Statute.

§ 1016. Outline of Discussion.

In the discussion of title to land by adverse possession under the statute of Limitations, we shall examine (1) The origin of statutes of Limitation to the recovery of land; (2) The effect of "continual claim" as prolonging the period of limitation; (3) The doctrine that "descent tolls entry;" (4) The period of adverse possession prescribed by the Virginia statute; (5) The statute of Limitations as a *source of title* to the occupant, as well as a *bar* to the claimant; (6) The disabilities of the claimant as prolonging the statutory period; (7) The tacking of disabilities; (8) *Nullum tempus occurrit regi*; (9) Nature of the occupant's possession; (10) The duration of the occupant's possession; (11) Continuity of occupant's possession; (12) Fraudulent possession of occupant; (13) Notoriousness of occupant's possession; (14) Exclusiveness of occupant's possession; (15) Hostile character of occupant's possession; (16) Occupation through mistake as to boundaries; (17) Adverse possession how negatived; (18) Occupant's possession, actual or (1095)

constructive; (19) Effect of the acquisition of a new right by the rightful claimant; (20) Nature of claimant's entry in order to oust an adverse occupant; (21) Application of the statute of Limitations as to land in equity.

§ 1017. Origin of Statutes of Limitation as Applicable to the Recovery of Land.

From a very early period of the law, that is, from the twelfth century, probably in consequence of some *non-extant* statute or assize, in *ancient time*, as Coke expresses it, there was a limitation imposed on real actions, even on that most favored one, the writ of right, namely, that it should not avail to recover real property where the right of the claimant accrued prior to the time of Henry I, that is, the first year of his reign (A. D. 1100); afterwards, by 20 Henry III, c. 8, the limitation was reduced to the time of Henry II (A. D. 1154); and later still, by 3 Edw. I, c. 39, and 13 Edw. I, c. 46, to 1 Richard I (A. D. 1189); when after an interval so long as practically to interpose no limitation at all, by 32 Henry VIII, c. 2 (A. D. 1541), and 21 Jac. I, c. 16 (A. D. 1624), a *period of years* was fixed as a bar, not to writs of right only, but to most of the other remedies for things real; so that, by one constant law, certain limitations might serve with equal convenience, both for the time present, and for all times to come.¹

And this policy has been ever since pursued, not only in the mother country, but also in Virginia and generally in the United States.

§ 1018. "Continual Claim," as Prolonging the Period of Limitation.

At common law, if one is prevented by threats or violence from entering on lands where he has a right of entry, and will make his claim as near the premises as may be, and will repeat it from year to year, he does, at common law, by such *continual claim*, as it is called, keep alive his right of entry and of action.¹

1. 2 Min. Insts. 568, 569; Bac. Abr. Limitations (B).

1. 2 Min. Inst. 576; 1 Lom. Dig. 802; 2 Bl. Com. 316; 3 Bl. Com. 175.

(1096)

But in Virginia it is declared by statute, that no continual or other claim upon or near any land shall preserve a right of entry or of action.²

§ 1019. Common Law Doctrine That “Descent Tolls Entry.”

At common law, if a disseisor or other wrongdoer dies possessed of the land of which he became seised by his own unlawful act, and the same descends to his heir, the heir hath thereby obtained an *apparent* right, though the *actual* right of possession remains in the person disseised; but the latter cannot divest this apparent right by a *mere entry*, or other act of his own, but only by an *action at law*; for until the contrary be proved by legal demonstration, the law will rather presume the right to reside in the heir, whose ancestor died seised, than in one who has no such presumptive evidence to urge in his own behalf. The descent, in such a case, is said to *toll*, or take away, the seisin, agreeably to the maxim *descensus tollit seisinam*.¹

This doctrine arose from considerations connected with feudal policy, which was always solicitous to provide some one at hand to perform the feudal services, and to offer to the military vassal, as one of the strongest incentives to courage in battle, the assurance that, if he fell, his children or heirs would be, as to their inheritance, better off even than himself, being exempt from all danger of any eviction by sudden entry, or any otherwise than by the slow process of a real action.²

But in Virginia it is now declared by statute that the right of entry on, or of action for, lands shall *not be tolled or defeated by descent cast*.³

§ 1020. Period of Adverse Possession Prescribed by Virginia Statute of Limitations.

There are in Virginia three classes of legal remedies for the

2. Va. Code, 1904, § 2916; 2 Min. Insts. 576.

1. Ante, § 145; 2 Min. Insts. 519; 2 Bl. Com. 196.

2. 2 Min. Inst. 519; 2 Bl. Com. 196, 197; 3 Bl. Com. 176.

3. Va. Code, 1904, § 2715; 2 Min. Insts. 519, 577.

recovery of lands, namely; (1) The merely *possessory* action of forcible or unlawful entry, or unlawful detainer, wherein a party turned *forcibly* or *unlawfully* out of the possession of lands, no matter what right or title he has thereto or whether he has any at all, or a party against whom the possession is *unlawfully detained*, may recover such *possession*; (2) the remedy of lawful and peaceable *entry* (without breach of the peace), as upon a condition broken or a disseisin; and (3) the action of *ejectment*, by which the real and lawful right and title of the claimant to the land itself may be judicially ascertained.

With respect to the first, that is, the writs of forcible entry, unlawful entry or unlawful detainer, they are limited by the statute creating them to *three years* after the act of forcible entry, or unlawful entry or detainer, no saving in consequence of any disability being allowed.¹

With respect to the second and third remedies, namely, *peaceable entry* upon the land and the action of *ejectment*, the statute declares that "no person shall make an *entry on*, or bring an action (practically confined to the action of *ejectment*) to recover, any land lying east of the Alleghany mountains, but within *fifteen years*, or any land lying west of the Alleghany mountains, but within *ten years*, next after the time at which the right to make such entry or bring such action shall have first accrued to himself or to some person through whom he claims;² saving for the disabilities of *infancy* and *insanity*, ten years next after the removal of the disability or the death of the claimant whichever shall happen first; but the time in no case is to exceed *twenty years*.³

§ 1021. Statute of Limitations a Source of Legal Title to Adverse Occupant as Well as a Bar to Claimant.

The statute of Limitations, above described, is not only a

1. Va. Code, 1904, § 2716; 2 Min. Insts. 574.

2. Va. Code, 1904, § 2915; 2 Min. Insts. 574; 1 Lom. Dig. 792. The county of Carroll is declared by the statute itself to lie wholly west of the Alleghany mountains.

3. Va. Code, 1904, §§ 2917, 2918.

defense which the occupant may interpose in bar of the plaintiff's action for the land, but it also constitutes a *source of title* to the occupant, to which he may appeal to sustain an action of ejectment brought by him as *plaintiff*, whether against the rightful claimant or a third person, provided the occupant's possession has been such as will cause the statute of Limitations to have run in his favor.¹

Thus, where one has been in honest, uninterrupted and adverse possession of the subject in question for the period prescribed by the statute as a bar, say of lands for fifteen years (and of *chattels* for five), and is then deprived of the possession, he may found his title upon his previous possession, and maintain an action for the subject accordingly. Lapse of time in such cases not only bars the remedy, but extinguishes the adversary's right.²

§ 1022. Disabilities of Claimant as Prolonging the Statutory Period.

The disabilities which, under the statute as it now stands, prolong the period of limitation are (1) infancy, and (2) insanity, of the claimant, existing at the time the right of entry or of action first accrued.¹

In the case of *coparceners* and *tenants in common*, since they may *sue severally* to recover their shares, if there be an *ouster*

1. 2 Min. Insts. 574. See cases cited *infra*, note 2.

2. 2 Min. Insts. 574; *Stocker v. Berney*, 1 Ld. Raym. 741; *Barwick v. Thompson*, 7 T. R. 492; *Newby v. Blakey*, 3 H. & M. 37, 66; *Brent v. Chapman*, 5 Cr. 358, 361; *Shelby v. Guy*, 11 Wheat. 361; *Turpin v. Saunders*, 32 Gratt. (Va.) 37; *Denn v. Barnard*, Cowp. 597; *Taylor v. Horde*, 1 Burr. 60, 119, 126; *Leffingwell v. Warren*, 2 Black (U. S.) 605; *Croxall v. Shererd*, 5 Wall. 269, 289; *Dickerson v. Colgrove*, 100 U. S. 583; *Bicknell v. Comstock*, 113 U. S. 152; *Campbell v. Holt*, 115 U. S. 623.

1. Va. Code, 1904, § 2917. Until recently the statute also allowed for the disability of *coverture* as to property *not the separate estate* of the married woman. Va. Code (1887), § 2917; 2 Min. Insts. 575. But since now *all* a married woman's property is her separate estate, this portion of the statute became meaningless, and has been omitted. Va. Code, 1904, § 2286a.

of all, the disability of one of the cotenants does not preserve the title of another, but merely his own title.² And although it would seem upon principle to be otherwise in the case of *joint tenants*, unless altered by statute, since they sue *jointly* at common law,³ yet the same rule seems to have been established in Virginia with respect to joint tenants as in the other cases, even in the absence of statute.⁴

It is to be further observed that the statute allows such disability, existing when the cause of action first accrued, to be taken advantage of not only by the party who is himself under the disability, but by *any person claiming through him*.⁵

The period of limitation, where a disability exists, is prolonged for *ten years* next after the time at which the person to whom the right has first accrued shall have ceased to be under such disability as existed when the same so accrued, or shall have *died*, whichever shall first have happened, provided that the period shall in no case exceed twenty years next after the time at which the right shall have first accrued, although the person then under disability may have remained incapacitated during the whole twenty years, or although the term of *ten years* from the period when his disability ceased, or when he died, shall not have expired.⁶

§ 1023. Same—Tacking of Disabilities.

If a person labor under several disabilities when the cause of action accrued, he may avail himself of that which continues longest; but when the period of limitation prescribed by the statute once begins to run, it will continue to do so, notwithstanding any disability in the party himself or in another.

2. 2 Min. Insts. 575, 1 Lom. Dig. 807; *Marsteller v. McLean*, 7 Cr. 156; *Doe v. Barksdale*, 2 Brock. (U. S. C. C.) 444, 445; *Merryman v. Hoover*, 107 Va. 485, 59 S. E. 483.

3. Ante, § 890.

4. 2 Min. Insts. 575; *Redford v. Clarke*, 100 Va. 115, 40 S. E. 630.

5. Va. Code, 1904, § 2917.

6. Va. Code, 1904, §§ 2917, 2918; 2 Min. Insts. 575, 577; 1 Lom. Dig. 807.

Neither can a disability which arises *after the title accrued* be taken advantage of with us, though the later one occurs before the first is at an end; or, as it is commonly expressed, one disability *cannot be tacked* to another.¹

And where the claimant dies still under disability and is succeeded by another also under disability, the time for bringing the suit or making the entry is not thereby prolonged. The two disabilities cannot be tacked. No time to make an entry or to bring an action beyond the fifteen years next after the right of such person shall have first accrued, or the ten years next after the period of his death, is allowed by reason of any disability of any other person.²

§ 1024. Nullum Tempus Occurrit Regi.

At common law, no lapse of time barred the *king's* title, the maxim of the law being "*nullum tempus occurrit regi.*" And so it is in Virginia, in respect to the claims of the Commonwealth, (and the *federal* government, also), except where it is otherwise provided by statute.¹

This principle is further affirmed in Virginia by an express enactment declaring that "no statute of Limitations, which shall not *in express terms* apply to the Commonwealth, shall be deemed a bar to any proceeding by or on behalf of the same."²

1. 2 Min. Insts. 576; 1 Lom. Dig. 804, et seq.; 2 Tiffany, Real. Prop., § 439; Doe v. Barksdale, 2 Brock. (U. S. C. C.) 436; Jackson v. Johnson, 5 Cow. (N. Y.) 74, 15 Am. Dec. 433; North v. James, 61 Miss. 761; Demarest v. Wynkoop, 3 Johns. Ch. (N. Y.) 129, 8 Am. Dec. 476; Duckett v. Crider, 11 B. Mon. (Ky.) 188; McFarland v. Stone, 17 Vt. 165, 44 Am. Dec. 325. But see Miller v. Bumgardner, 109 N. C. 412.

2. Va. Code, 1904, § 2918; 2 Min. Insts. 577; 1 Lom. Dig. 804, et seq.; Pim v. St. Louis, 122 Mo. 654; Henry v. Carson, 59 Penn. St. 297; Dowell v. Tucker, 46 Ark. 438.

1. 2 Min. Insts. 575; Bac. Abr. Limitation; Gibson v. Chouteau, 13 Wall. 92; Kemp v. Com., 1 Hen. & M. (Va.) 85; Gore v. Lawson, 8 Leigh (Va.) 462; Nimmo v. Com., 4 Hen. & M. 57, 4 Am. Dec. 488; Green v. Pennington, 105 Va. 805, 54 S. E. 877.

2. Va. Code, 1904, § 2937; 2 Min. Insts. 575. And the same proposition is true as to any restriction upon the rights of the Common-
(1101)

But the ordinary statutory limitation will begin to run in favor of an adverse occupant, as soon as the ownership of the land passes from the state to the state's grantee.³

According to the better view, since a municipal or *quasi* municipal corporation is but the *agent of the state*, the same maxim applies to these, and adverse possession will not give title as against them—at least, so far as relates to land held by them in their *governmental and public capacity*.⁴ It is other-

wealth, that is, in order to avail, such restriction must be clearly proved to have been designed by the statute, *Com. v. Ford*, 29 Gratt. (Va.) 687. Several limitations, however, have been expressly imposed upon the commonwealth; as that no land shall be liable to *escheat* which for twenty years has been in the possession of the person claiming the same, or those under whom he holds, and upon which taxes have been paid within that time, Va. Code, 1904, § 2374 (overruling the doctrine of *French v. Com.*, 5 Leigh (Va.) 516, 519, 27 Am. Dec. 613); and also that no location of a *land office warrant* shall be made on any land which shall have been continuously settled for five years previously, upon which taxes have been paid at any time within that five years, by the person having settled the same, or any person claiming under him; and any title of the commonwealth to such lands is relinquished. Va. Code, 1904, § 2339; *Tichanal v. Roe*, 2 Rob. 288. It is held, indeed, that, independently of statute, as between a junior patentee and one in possession who traces back his title for upwards of seventy years, it is a presumption of law that a commonwealth's grant has issued for the land, and hence it is not subject to entry and grant by the state as waste and unappropriated land. 2 Min. Insts. 575; *Matthews v. Burton*, 17 Gratt. (Va.) 317; *Archer v. Saddler*, 2 Hen. & M. (Va.) 370; *Bullard v. Barksdale*, 11 Ired. L. (N. C.) 461.

3. 2 Tiffany, Real. Prop., § 440; *Smith v. McCorkle*, 105 Mo. 135; *Stringfellow v. Tenn. Coal, I. & R. Co.*, 117 Ala. 250; *Patten v. Scott*, 118 Penn. St. 115, 4 Am. St. Rep. 576; *Nichols v. Council*, 51 Ark. 26, 14 Am. St. Rep. 20; *Mathews v. Ferea*, 45 Cal. 51; *Udell v. Peak*, 70 Tex. 547. But the decisions are not in accord as to the time when such private ownership commences, some holding that it does not begin until *the issue of the patent*, others that it begins as soon as the land is paid for and the individual becomes *entitled* to the patent. 2 Tiffany, Real Prop., § 440.

4. 2 Tiffany, Real Prop., § 440; 2 Dillon, Munic. Corp., § 667. et seq.; *Almy v. Church*, 18 R. I. 182; *Cheek v. Aurora*, 92 Ind. 107; (1102)

wise as to land owned or claimed by them in their *private* capacity, such as gas works, water works, etc.⁵

§ 1025. Nature of Occupant's Possession in General.

In order that adverse possession under the statute of Limitations may operate as a bar to the claimant's right of entry or of action, and to vest a title to the land in the occupant, it is necessary (1) that the possession of the occupant, or of those claiming under or after him, should have *lasted during the period* prescribed by the statute; (2) that such possession should meanwhile have been *continuous and uninterrupted* by any return of the land to the ownership of the claimant; (3) that the occupant's possession should have been free from fraud; (4) that it should have been *visible and notorious*; (5) that it should have been *exclusive*; (6) that it should have been *hostile*; and (7) that it should be *actual*, in general, though sometimes a *constructive* possession by the occupant under color of title (that is, under a *paper title*) will suffice.¹

The possession, to give the occupant title, must embrace all

Webb v. Demopolis, 95 Ala. 116; Ralston v. Weston, 46 W. Va. 544, 76 Am. St. Rep. 834; Board of Education v. Martin, 92 Cal. 209; Kitting Academy v. Brown, 41 Penn. St. 269. But see Covington v. McNickle, 18 B. Mon. (Ky.) 262; Oxford Township v. Columbia, 38 Ohio St. 87; Fort Smith v. McKibbin, 41 Ark. 45, 48 Am. Rep. 19.

5. 2 Dillon, Munic. Corp., § 675; Ames v. San Diego, 101 Cal. 390; Chicago v. Middlebrooke, 143 Ill. 265; City of Bedford v. Willard, 133 Ind. 562.

1. 2 Min. Insts. 578, 579; 3 Th. Co. Lit. 4; 1 Lom. Dig. 795; Ward v. Cochran, 150 U. S. 597; Dawson v. Watkins, 2 Rob. (Va.) 269; Taylor v. Burnside, 1 Gratt. (Va.) 165, 186, 190; Thomas v. Jones, 28 Gratt. 383, 387; Nowlin v. Reynolds, 25 Gratt. 141; Bowie v. Poor School Soc., 75 Va. 304, 305; Stonestreet v. Doyle, 75 Va. 356, 370, 371, 40 Am. Rep. 731; Creekmur v. Creekmur, 75 Va. 434; Hollingsworth v. Sherman, 81 Va. 673; Hodgkin v. McVeigh, 86 Va. 751, 10 S. E. 1065; Hulvey v. Hulvey, 92 Va. 182, 23 S. E. 233; Sulphur Mines Co. v. Thompson, 93 Va. 294, 25 S. E. 232; Va. Midland R. Co. v. Barbour, 97 Va. 118, 33 S. E. 554; Trotter v. Cassaday, 3 A. K. Marsh. (Ky.) 365, 13 Am. Dec. 185, note; Love v. Shields, 3 Yerg. (Tenn.) 405.

(1103)

of these elements, the want of any one of them being fatal to his title. Thus, in *Ward v. Cochran*,² the jury in an ejectment suit having brought in a *special verdict* to the effect that the defendant's possession of the land had been "open, continued, notorious and adverse" for the time required by the statute, the court held that inasmuch as the jury had failed to find the possession to have been *exclusive* and *actual*, it was an imperfect verdict, and a *venire facias de novo* should be awarded.

We shall consider each one of these elements in their order.

§ 1026. Duration of Occupant's Possession.

The duration of the adverse possession is prescribed by the statute, being, in order to repel the action of forcible entry, etc., *three years*, and in order to repel the peaceable entry of the claimant, or any other action by him than forcible entry, etc., *fifteen years* east, and *ten years* west of the Alleghany mountains, subject, in the case of peaceable entry or of any action other than forcible entry, unlawful entry or unlawful detainer, to some prolongation because of the disabilities of infancy and insanity, as already explained.¹

§ 1027. Continuity of Occupant's Possession.

The possession of the occupant, or of those claiming under or after him, must *continue uninterruptedly* during the statutory period. If there be an interruption, during which the possession of the original claimant, or those holding under him, is restored, or recognized as existing, after which interruption possession is *resumed* by the occupant, the running of the limitation period not only ceases during the period of the interruption, but *ceases altogether*, and the count must be *begun anew* upon the occupant's resumption of possession.¹

2. 150 U. S. 597.

1. Va. Code, 1904, §§ 2716, 2915, 2917, 2918.

1. 2 Min. Insts. 577; 1 Lom. Dig. 794; *Kinney v. Beverley*, 2 Hen. & M. (Va.) 318, 341; *Taylor v. Burnside*, 1 Gratt. (Va.) 165, 189, 202; *Middleton v. Johns*, 4 Gratt. 129; *Old South Soc. v. Wainwright*, 156 Mass. 115; *Bliss v. Johnson*, 94 N. Y. 235; *Armstrong v. Ristean*, 5 Md. 256, 59 Am. Dec. 115; *Ross v. Goodwin*, 88 Ala. 390. (1104)

Such a break in the continuity of the possession may occur upon the occupant's *abandonment* of the premises,² but the mere fact that the acts of possession are not continuous, day in and day out, or that there are cessations of actual occupancy, does not necessarily show an interruption of the possession, the consequences depending on the nature of the land and of the acts in question, and upon the circumstances of the particular case.³

A break in the continuity of the possession may also arise from the actual ouster, or open and notorious acts amounting to an ouster, of the occupant by the rightful owner, and his resumption of the possession of the occupied land, within the statutory period;⁴ or by the occupant's *recognition* of the true owner's right to the possession;⁵ or by the owner's *recovery* of the land in the action of ejectment.⁶

§ 1028. Same—Tacking of the Possession of One Occupant to That of Another.

If an occupant, before he has been in possession of the land as against the true owner for the full statutory period, *dies* or *transfers* his interest in the land to another, or is *disseised* by a

2. 2 Min. Insts. 581; *Taylor v. Burnside*, 1 Gratt. (Va.) 165, 201, 210; *Hollingsworth v. Sherman*, 81 Va. 674; *Downing v. Mayes*, 153 Ill. 330, 46 Am. St. Rep. 896; *Stephens v. Leach*, 19 Penn. St. 262; *Nixon v. Porter*, 38 Miss. 401; *Sharp v. Johnson*, 22 Ark. 79.

3. 2 Tiffany, Real Prop., § 437; *Downing v. Mayes*, 153 Ill. 330, 46 Am. St. Rep. 896; *Hughes v. Pickering*, 14 Penn. St. 297; *Ford v. Wilson*, 35 Miss. 490, 72 Am. Dec. 137.

4. 2 Min. Insts. 581; *Taylor v. Burnside*, 1 Gratt. (Va.) 165, 208, 210; *Bowen v. Guild*, 130 Mass. 121; *Altamas v. Campbell*, 9 Watts (Penn.) 28, 34 Am. Dec. 494; *Burrows v. Gallup*, 32 Conn. 493, 87 Am. Dec. 186; *Campbell v. Wallace*, 12 N. H. 362, 37 Am. Dec. 219.

5. 2 Tiffany, Real Prop., § 437; *Warren v. Bowdran*, 156 Mass. 280; *Ingersoll v. Lewis*, 11 Penn. St. 212, 51 Am. Dec. 536; *Williams v. Scott*, 122 N. C. 545; *Lovell v. Frost*, 44 Cal. 471.

6. 2 Tiffany, Real Prop., § 437; *Moore v. Greene*, 19 How. 69; *Bishop v. Truett*, 85 Ala. 376; *Smith v. Hornback*, 4 Litt. (Ky.) 232, 14 Am. Dec. 122; *Gould v. Carr*, 33 Fla. 523; *McGrath v. Wallace*, 85 Cal. 622; *Mabary v. Dollarhide*, 98 Me. 198, 14 Am. St. Rep. 639.

third person, a question is at once presented whether the successor to the first occupant is entitled to have the possession of the first occupant counted in with his own, or "tacked," in order to hasten the vesting of the title by adverse possession under the statute of Limitations.

Various considerations are to be looked to in answering these questions, and it is advisable to take up the cases above presented in succession, the general principle being that the two possessions, to be tacked, must be *in privity* or *connected*.¹

§ 1029. Same—1. Death of First Occupant.

It appears to be conceded that if, upon the occupant's death, his *heir* or *devisee* immediately enters and takes possession of the land, his possession may be *tacked* to that of his ancestor or testator, so that the two periods may be reckoned as one in estimating the duration of the adverse possession.¹

So, the *widow* of the occupant, being entitled to *quarantine*,² and an immediate entry upon the land for that purpose, may "tack" such possession to the possession of her deceased husband.³ But it is said to be otherwise with respect to the *ordinary dower rights* of the widow, because of the *break of continuity* between the husband's death and the time of the assignment of her dower.⁴ It will be remembered, however, that upon assignment, the widow takes, *by relation*, as from her husband's death.⁵

1. See *Hollingsworth v. Sherman*, 81 Va. 674.

2. *Tiffany*, Real Prop., § 438; *Haynes v. Boardman*, 119 Mass. 414; *Sawyer v. Kendall*, 10 Cush. (Mass.) 241; *McNeely v. Langan*, 22 Ohio St. 32; *Overfield v. Christie*, 7 Serg. & R. (Penn.) 173; *Fugate v. Pierce*, 49 Mo. 441.

3. Ante, § 338.

4. *Hannon v. Hounihan*, 85 Va. 429, 12 S. E. 157. See *Hulvey v. Hulvey*, 92 Va. 182, 185, et seq., 23 S. E. 233.

5. *Tiffany*, Real Prop., § 438; *Sawyer v. Kendall*, 10 Cush. (Mass.) 241; *Robinson v. Allison*, 124 Ala. 325. But see *Mill v. Bodley*, 4 T. B. Mon. (Ky.) 248; *Hickman v. Link*, 97 Mo. 482.

5. Ante, § 274. See *Hulvey v. Hulvey*, 92 Va. 182, 23 S. E. 233. (1106)

§ 1030. **Same—2. Transfer by First Occupant.**

Upon a transfer of his rights (such as they are) by the first occupant to a second who immediately enters and continues the possession without a break, the weight of authority, though perhaps not of reason, is in favor of the latter's right to "tack" his possession to that of his grantor;¹ yet, rather inconsistently, it is quite generally held that the transfer, not being of any actual legal interest in the land, need not conform to the statute of Frauds, and may be *oral*.² It would seem upon principle that if the transfer of the first occupant's potential title by adverse possession should avail his grantee to hasten the vesting of his own title by adverse possession, it should be regarded as a sufficiently valuable interest in the land to require its transfer to conform to the statute regulating the transfer of interests in land, or *per contra*, if the transfer passes no interest in the land, it should create *no privity* between the parties and should be given no effect in hastening the running of the statute of Limitations.³

§ 1031. **Same—3. Disseisin of First Occupant.**

However, it may be where there is a *contractual* connection between the successive occupants, such as has just been considered, it seems to be quite generally conceded that if the first adverse occupant is *disseised* by his successor, the latter, for want of privity, cannot tack the disseisee's possession to his own.¹

1. *Frost v. Courtis*, 172 Mass. 401; *Overfield v. Christie*, 7 Serg. & R. (Penn.) 173; *McNeely v. Langan*, 22 Ohio St. 32; *Gage v. Gage*, 30 N. H. 420. But see *Garrett v. Weinburg*, 48 S. C. 28.

2. 2 *Tiffany*, Real Prop., § 438; *Hughs v. Pickering*, 14 Penn. St. 297; *McNeely v. Langan*, 22 Ohio St. 32; *Com. v. Gibson*, 85 Ky. 666; *Davock v. Nealon*, 58 N. J. L. 21.

3. See *Sawyer v. Kendall*, 10 Cush. (Mass.) 241; *Ward v. Bartholomew*, 6 Pick. (Mass.) 409. See, also, *Hulvey v. Hulvey*, 92 Va. 182, 23 S. E. 233.

1. 2 *Tiffany*, Real Prop., § 438; *Sawyer v. Kendall*, 10 Cush. (Mass.) 241; *Lucy v. Railway Co.*, 92 Ala. 246; *Erck v. Church*, 87 Tenn. 580; (1107)

§ 1032. Fraudulent Possession of Occupant.

A *fraudulent* possession can prove nothing as to the proper right of the party who insists on such possession, or as to any presumed relinquishment of the adverse claimant. It is an acknowledged principle, at least in courts of equity, that in cases of fraud the statute of Limitations commences not to run, in general, until the fraud is discovered.¹

§ 1033. Notoriousness of Occupant's Possession.

It is by no means the purpose of the statute of Limitations to permit one man to deprive another of his land by fraud and chicanery, or by acts of ownership exercised *in secret*, so that the owner might not reasonably be expected to know of the adverse claim. On the contrary, it is well established that the occupant's entry upon the land must be followed by *acts of ownership*, sufficiently pronounced and continuous in character to charge the owner with *notice* of the occupant's adverse claim, such as continued residence on the land, or the cultivation and improvement thereof, or in some cases the building of fences, or in the case of wild mountain lands acts perhaps even less pronounced.¹

The character of the acts necessary to give to the party the seisin required, must, of course, vary with the situation of the

Jarrett v. Stevens, 36 W. Va. 445, 15 S. E. 177; San Francisco v. Fulde, 37 Cal. 349, 99 Am. Dec. 278. But see Davis v. McArthur, 78 N. C. 357; Scales v. Cockrill, 3 Head (Tenn.) 432.

1. 2 Min. Insts. 578; 2 Story, Eq. Jur., §§ 1521, 1521a; Hunter v. Spottswood, 1 Wash. (Va.) 145; Kane v. Bloodgood, 7 Johns. Ch. (N. Y.) 122; Kitty v. Fitzhugh, 4 Rand. (Va.) 600; Evans v. Spurgin, 11 Gratt. (Va.) 623; Rowe v. Bentley, 29 Gratt. 760; Massie v. Heiskell, 80 Va. 789, 804; Badger v. Badger, 2 Wal. 92.

1. 2 Min. Insts. 580; Overton v. Davisson, 1 Gratt. (Va.) 217, 42 Am. Dec. 544; Va. Midland R. Co. v. Barbour, 97 Va. 118, 33 S. E. 554; Lusk v. Pelter, 101 Va. 790, 45 S. E. 333; Alabama Land Co. v. Kyle, 99 Ala. 474; Susquehanna, etc., R. Co. v. Quick, 68 Penn. St. 189; Congdon v. Morgan, 14 S. C. 587; Brumagin v. Bradshaw, 39 Cal. 24, 50; Ewing v. Burnett, 11 Pet. 53; Barclay v. Howell, 6 Pet. 513. See cases cited *infra*, note 2.

(1108)

land, and the condition of the country. In a settled and cultivated region, an actual occupation and pertainancy of the profits may be requisite; whilst in the wilderness, a possession less definite might suffice, if it appeared that the property was not susceptible of a stricter occupation; but it must always be an actual, visible, notorious and continued possession. And hence wild and uncultivated lands, remaining completely in a state of nature, cannot be the subject of adversary possession. If such notoriety, and continuousness of seisin in the adverse claimant were not demanded, any proprietor of vacant lands might be disseised and deprived of his lands without his knowledge or the possibility of protecting himself.²

Such being the character of adversary possession, it has been made a question whether such possession can be had of lands *covered with water*. There is no doubt, however, that acts of ownership may be habitually and notoriously exercised in respect to lands so situated, as by staking them off, insisting upon the exclusive right to use and enjoy them, and in other like ways, and so an adversary possession may be established.³

On the other hand, the mere *sporadic and occasional* entry upon the land for the purpose of surveying the same, or of cutting and sawing timber, the possession being transient, is not enough to operate a disseisin of the rightful owner; nor if it were, is it such continuous, exclusive, and notorious possession as can by itself support a claim of title in opposition to the superior title of the true owner.⁴

2. 2 Min. Insts. 580, 581; Dawson v. Watkins, 2 Rob. (Va.) 269, 270; Overton v. Davisson, 1 Gratt. (Va.) 217, 225, 42 Am. Dec. 544; Taylor v. Burnside, 1 Gratt. 165, 190, 198, 208, 210; Turpin v. Saunders, 32 Gratt. 35, 36; Harman v. Ratliff, 93 Va. 249, 253, 24 S. E. 1023; Va. Midland R. Co. v. Barbour, 97 Va. 118, 33 S. E. 554; Lusk v. Pelter, 101 Va. 790, 45 S. E. 533.

3. 2 Min. Insts. 581; Power v. Tazewell, 25 Gratt. (Va.) 786; Norfolk City v. Cooke, 27 Gratt. 436, 437. See Austin v. Minor, 107 Va. 101, 57 S. E. 609.

4. 2 Min. Insts. 580; Dawson v. Watkins, 2 Rob. (Va.) 259, 269; Pasley v. English, 5 Gratt. (Va.) 141, 152, 157; Anderson v. Harvey, 10 Gratt. 386, 397; Denham v. Holeman, 26 Ga. 182, 71 Am. Dec. 198;

Finally, it is to be observed that if the occupant's possession was *begun in privity* with the rightful claimant, a higher degree of notoriety must attach to the possession than would be demanded if there were no such relation between the parties, for the privity is itself an explanation of the possession, and the rightful owner is not bound to seek another, unless notice of the fact of the disloyal *severance of the privity* be brought home to him. Hence, in such case, there must be a clear, positive and continuous disclaimer and disavowal of the title, of the rightful owner, and the assertion of an adverse right brought home to the adverse claimant. The possession must have become tortious and unlawful by the disloyal acts of the party in possession, so open, notorious and continued as to show fully and clearly the *changed character of his possession* and notice thereof to the rightful claimant.⁴ This principle is applicable, for example, as between vendor and vendee under an imperfect contract of sale,⁵ as between landlord and tenant,⁶ grantor and grantee (the grantor remaining in possession),⁷ and other cases of the same sort.⁸

§ 1034. Exclusiveness of Occupant's Possession.

It is one of the essentials of adverse possession that it be

Parker v. Wallis, 60 Md. 15, 45 Am. Rep. 703; Wheeler v. Winn, 53 Penn. St. 122, 91 Am. Dec. 186; Williams v. Wallace, 78 N. C. 354.

4. Hulvey v. Hulvey, 92 Va. 182, 23 S. E. 233; Thompson v. Camper, 106 Va. 317, 55 S. E. 674.

5. Chapman v. Chapman, 91 Va. 397, 50 Am. St. Rep. 846, 21 S. E. 813; Marbach v. Holmes, 105 Va. 178, 52 S. E. 828; Clarke v. McClure, 10 Gratt. (Va.) 305; Alleghany County v. Parrish, 93 Va. 615, 25 S. E. 882.

6. Neff v. Ryman, 100 Va. 521, 42 S. E. 314; Reusens v. Lawson, 91 Va. 226, 21 S. E. 347.

7. Va. Midland R. Co. v. Barbour, 97 Va. 118, 33 S. E. 554.

8. See Clarke v. McClure, 10 Gratt. (Va.) 305; Creigh v. Henson, 10 Gratt. 231; Nowlin v. Reynolds, 25 Gratt. 137, 141; Lewis v. Overby, 31 Gratt. 601, 616; Creekmur v. Creekmur, 75 Va. 430, 436; Hulvey v. Hulvey, 92 Va. 182, 23 S. E. 233; Alleghany County v. Parrish, 93 Va. 615, 622, 25 S. E. 882; Thompson v. Camper, 106 Va. 315, 55 S. E. 674.

(1110)

exclusive, that is, that it exclude and deny all idea of ownership either in the *true owner* or in a *third person*;¹— of the *true owner*, because, if he is also in possession or has a right to the possession, the possession of *another* would in law be regarded either as a *trespass* merely or as in the exercise of a *license*, neither of which theories would give rise to an adverse possession;² and of *third persons*, because if he permits others also to exercise acts of ownership upon the land (except as his tenants or licensees) he is asserting a title not in *himself*, but in the *public*.³

On the other hand, it is to be observed that a grantee under an invalid transfer, who is in actual and exclusive possession of an entire tract for the requisite period takes a title to the entire tract by adverse possession, exclusive of the rights of others who were tenants in common with his grantor, provided the grantor has conveyed to him the whole tract and not merely his individual interest therein.⁴

§ 1035. Hostile Character of Occupant's Possession.

As no one can be barred by the statute of Limitations unless he is out of possession, and as the possession of one claiming *under* another is considered as in fact the possession of the latter, it follows that, in order to plead the statute of Limitations successfully, the possession must be *adverse* to that of the true owner under some claim of right such as will exclude any recognition of the latter's rights. It is not necessary, however, that

1. *Ward v. Cochran*, 150 U. S. 597; *Va. Midland R. Co. v. Barbour*, 97 Va. 118, 33 S. E. 554; *Collins v. Lynch*, 167 Penn. St. 635; *Cahill v. Palmer*, 45 N. Y. 478; *Goodson v. Brothers*, 111 Ala. 589.

2. *2 Tiffany, Real Prop.*, § 442; *Bellis v. Bellis*, 122 Mass. 414; *O'Hara v. Richardson*, 46 Penn. St. 385; *Brown v. Chicago, etc., R. Co.*, 101 Mo. 484.

3. *2 Tiffany, Real Prop.*, § 442; *Kneller v. Lang*, 137 N. Y. 589; *Burrows v. Gallup*, 32 Conn. 493, 87 Am. Dec. 186; *Gittings v. Moale*, 21 Md. 135.

4. *Preston v. Va. Mining Co.*, 107 Va. 248, 57 S. E. 651; *Johnston v. Va. C. & I. Co.*, 96 Va. 158, 31 S. E. 85.

there should be *color of title* (that is, *written* evidence of title, such as a deed, a patent from the state, etc.).¹

It is immaterial whether the claim of right be true or false, good or bad, in the first instance; but if there be a mere claim, *without color of title*, the adverse holding of the occupant is always confined to that portion of the land *actually occupied*.² On the other hand if the adverse possession be *under color of title*, the possession may, under certain circumstances, extend beyond the limits of the land *actually occupied*, and may embrace all the land covered by the deed or other muniment of title under which the occupant claims.³

Where the origin of the possession is not accounted for, and would be unlawful unless there had been a grant, length of possession is *prima facie* evidence, but only *prima facie*, from which a jury might or might not have presumed a conveyance.⁴ But no mere period of possession will warrant a presumption of title, when the origin of the possession is shown to be *consistent* with the title of the rightful owner, but there must be a distinct, clear and positive disavowal of the latter's title, which disavowal must be brought home to the latter.⁵

1. 2 Min. Insts. 578; 1 Lom. Dig. 794; *Williams v. Lewis*, 5 Leigh (Va.) 691; *Coalter v. Hunter*, 4 Rand. (Va.) 58, 15 Am. Dec. 726; *Va. Midland R. Co. v. Barbour*, 97 Va. 118, 33 S. E. 554. The phrase "*claim of title*" is to be distinguished from "*color of title*" in this connection, the latter applying only to that particular sort of claim which is based upon some written muniment of title, it being immaterial whether it be *valid* or *void*. See *Sulphur Mines Co. v. Thompson*, 93 Va. 294, 25 S. E. 232; 2 Va. Law Reg. 553; *Va. Midland R. Co. v. Barbour*, *supra*; *Sharp v. Shenandoah Furnace Co.*, 100 Va. 27, 40 S. E. 103.

2. *Va. Midland R. Co. v. Barbour*, 97 Va. 122, 33 S. E. 554; *Sulphur Mines Co. v. Thompson*, 93 Va. 319, 320, 25 S. E. 232; *Creekmur v. Creekmur*, 75 Va. 430, 436; *Kincheloe v. Tracewells*, 11 Gratt. (Va.) 605.

3. Post, § 1041, et seq.

4. 2 Min. Insts. 579; *Fenwick v. Reed*, 5 B. & Ald. 232.

5. 2 Min. Insts. 579; *Hulvey v. Hulvey*, 92 Va. 182, 23 S. E. 233; *Neff v. Ryman*, 100 Va. 521, 42 S. E. 314; *Marbach v. Holmes*, 105 Va. 178, 52 S. E. 828. See cases cited, ante, § 1033, note 8; post, § 1038. (1112)

§ 1036. Same—Occupation through Mistake as to Boundaries.

If one, either of set purpose or with entire indifference to the rights of his neighbor, builds upon, or otherwise occupies openly and notoriously his neighbor's land, there is no doubt but that this constitutes an adverse possession which will ripen after the lapse of the statutory period into a perfect legal title.¹

But if he is acting through a *bona fide* mistake as to his boundaries, honestly believing that he is upon his own land, and without any intention of ousting his neighbor, the question is more difficult of solution, as where he builds a few inches over his neighbor's line by mistake, believing he is on his own lot.

The solution depends upon the *intention* with which the possession is taken and held. If the intention be to take and hold the land at all events, whether it belong to the occupant or not, that is, to *oust* any adverse claimant, if necessary, the case comes under the first instance above described, and the possession would clearly be adverse.² But if the occupant have no such intention in his mind, but only the intention to use and enjoy his own property in a proper and lawful way, the courts are divided as to whether this constitutes the possession adverse.³

1. 2 Tiffany, Real Prop., § 443; Brock v. Bear, 100 Va. 565, 42 S. E. 307; McMurray v. Dixon, 105 Va. 605, 611, 54 S. E. 481; Finch v. Ullman, 105 Mo. 255, 24 Am. St. Rep. 383, note; Taylor v. Fourby, 116 Ala. 621; Watrous v. Morrison, 33 Fla. 261, 39 Am. St. Rep. 139; Wilson v. Hunter, 59 Ark. 626, 43 Am. St. Rep. 63; Grube v. Wells, 34 Ia. 148; Preble v. Maine Central R. Co., 85 Me. 260, 35 Am. St. Rep. 366.

2. See authorities cited *supra*, note 1.

3. Authorities holding that the *innocence* of the possession is immaterial, provided it be actual and visible, are Tolman v. Sparhawk, 5 Met. (Mass.) 469; Crary v. Goodman, 22 N. Y. 170; French v. Pearce, 8 Conn. 439, 21 Am. Dec. 680; Burnell v. Maloney, 39 Vt. 579, 94 Am. Dec. 358; Metcalf v. McCutchen, 60 Miss. 145; Yetzer v. Thoman, 17 Ohio St. 130, 91 Am. Dec. 122; Greene v. Anglemire, 77 Mich. 168; Dyer v. Eldridge, 136 Ind. 654; Ramsey v. Glenney, 45 Minn. 401, 22 Am. St. Rep. 736; Levy v. Yerga, 25 Neb. 764, 13 Am. St. Rep. 525. The following cases require the possession, in order that it be

The Virginia doctrine seems to be that if the occupant's intention is not the ruthless purpose to claim title at all events, whether he is legally entitled to the land or not, but merely the intention to occupy what is legally his own, the possession is *not adverse*.⁴

There are two important objections to this view, in that (1) it seems to place a premium on conscious evil doing; and (2) it introduces into the law of adverse possession an element of positive and conscious *intention* to take land not belonging to the occupant, which is unknown to the law of adverse possession under any other condition than that of mistake in locating a boundary line.⁵ On the other hand, it may be argued that the improvement of land might be discouraged by the enforcement of a different rule.

It may be observed also, in this connection, that if two adjacent landowners, whose boundary line is in dispute, agree *orally* upon a line, by way of compromise, and they take and hold possession up to that line for the statutory period, the mere possession will in time ripen into a title by adverse possession; but since neither party can disclaim to hold the freehold acquired under his deed, or transfer the same to another, save by *deed, will, or in a court of record*, the parties can in a court of *law* acquire no title by virtue of the *parol agreement* itself, nor in any way alter the rights already vested in them under their respective deeds.⁶ It would seem, however, upon principle that *in*

considered adverse, to be with the intent of claiming to the assumed boundary, *even though that boundary be incorrect*; *Ayers v. Reidel*, 84 Wis. 276; *Mills v. Penny*, 74 Ia. 172, 7 Am. St. Rep. 474; *Winn v. Abeles*, 35 Kan. 85, 57 Am. Rep. 138; *McCabe v. Bruere*, 153 Mo. 1; *Chance v. Branch*, 58 Tex. 490; *Canfield v. Clark*, 17 Or. 473, 11 Am. St. Rep. 845; and the cases cited *supra*, note 1.

4. *Haney v. Breeden*, 100 Va. 784, 42 S. E. 916; *Brock v. Bear*, 100 Va. 565, 42 S. E. 307; *Davis v. Owen*, 107 Va. 283, 58 S. E. 581.

5. 2 *Tiffany*, Real Prop., § 443; *French v. Pearce*, 8 Conn. 439, 21 Am. Dec. 680.

6. *McMurray v. Dixon*, 105 Va. 611, 54 S. E. 481; *Fry v. Stowers*, 98 Va. 417, 36 S. E. 482; *Suttle v. Richmond, F. & P. R. Co.*, 76 Va. 284, 286; *Watrous v. Morrison*, 33 Fla. 261, 39 Am. St. Rep. 139; *Vas-* (1114)

equity, such an agreement, though by parol, being *partly performed* by the surrender of the possession, should be regarded as transferring mutually the equitable title up to the boundary line agreed upon, at least as between the parties.⁷

But if the dispute as to the boundary line has originated by reason of the *ambiguous language of the deeds* conveying the land, one interpretation locating the boundary line at one place, another interpretation locating it elsewhere, and the agreement of the parties determines at which of these places it is to be located, merely interpreting the ambiguous language of the deeds, the agreement in such case is very generally held not to involve a *transfer of the title to land*, and hence the boundary line becomes fixed by such agreement, though it be merely *oral*.⁸

§ 1037. Adverse Possession Negatived in Certain Cases—Enumeration.

The *adverse* character of a possession, though it be long continued, may be negatived by the existence of certain circumstances, which, either as matter of law or matter of fact, take the case outside the realm of *adverse* possession.

These cases may be enumerated as follows: (1) where the parties claim under the same title; (2) where the possession of one party is consistent with the title of the other; (3) where the occupant has acknowledged the claimant's title.

burgh v. Teator, 32 N. Y. 561; *Nichol v. Lytle*, 4 Yerg. (Tenn.) 456, 26 Am. Dec. 240; *Olin v. Henderson*, 120 Mich. 149; *Gayheart v. Cornett*, 19 Ky. Law Rep. 1052, 42 S. W. 730; *Hartung v. Witte*, 59 Wis. 285; *Lennox v. Hendricks*, 11 Or. 33.

7. Post, § 1292, et seq.

8. *Watrous v. Morrison*, 33 Fla. 261, 39 Am. St. Rep. 139; *Brummell v. Harris*, 148 Mo. 420; *St. Bede College v. Weber*, 168 Ill. 324; *O'Donnell v. Penney*, 17 R. I. 164; *Lindsay v. Springer*, 4 Har. (Del.) 547; *Gwynn v. Schwartz*, 32 W. Va. 487, 9 S. E. 880; *Clark v. Hulsey*, 54 Ga. 608; *Harrell v. Houston*, 66 Tex. 278; *Pittsburg, etc., Iron Co. v. Lake Superior Iron Co.*, 118 Mich. 109; *Helm v. Wilson*, 76 Cal. 476; *Archer v. Helm*, 69 Miss. 730; *Glen Mfg. Co. v. Weston Lumber Co.*, 80 Fed. 242.

(1115)

§ 1038. Same—1. Where the Parties Claim under the Same Title.

The instances falling under this head are derived chiefly from England, our own cases affording few or none. Thus, if a father die seised in fee leaving two sons, and his younger son enters to the prejudice of the elder, and before him, although it amounts properly to an ouster of the elder by abatement, yet the statute does not operate against the elder son, because the law presumes that the younger entered claiming the land as *heir to his father* in order to preserve the inheritance in the family, and not as designing a wrong to his brother, and so his possession is the possession of the elder, who claims by the same title.¹

So also, if a sister enters upon the land descended from her father, before her brother, the legal heir, can do so, and remain in possession more than the time prescribed by the statute of Limitations, yet will it not avail her, for a like reason, because the law will intend that she entered as heir to the father, to preserve the inheritance, and not adversely to the brother, who, claiming by the same title, her possession enures as his.²

It must be observed that in both of these cases, if the lawful heir enters, and then is *ousted* by the younger brother or sister, it would be impossible to assign so charitable an interpretation to his act, and the possession of the wrongdoer is adverse.³

§ 1039. Same—2. Where the Possession of Occupant Is Consistent with Claimant's Title.

This is the case where the possession of one is the possession of the other, as in the instance of *agent* relatively to the principal, or of a *tenant* in respect to his landlord; or where the estate of the party in possession and that of the claimant form different parts of one and the same estate, as in the instance of a particular tenant and the remainderman; or where the relation of trustee and *cestui que trust*, or of mortgagor and mortgagee,

1. 2 Min. Insts. 583; 3 Th. Co. Lit. 47, 48, n. (Y), 50, et seq; 1 Lom. Dig. 709.

2. 2 Min. Insts. 583; 1 Lom. Dig. 709.

3. 2 Min. Insts. 583; 3 Th. Co. Lit. 50.

or of vendor and vendee, or of cotenancy, subsists between the parties.¹

But in all such cases, this *consistency* of the possessions of each lasts only so long as the possessions are not distinctly antagonistic, and immediately upon a clear, positive, and open disclaimer or disavowal by the occupant that he is holding in privity with the true owner, the possession becomes adverse.²

And it will be remembered that in case of co-tenants, whether joint tenants, tenants in common, or co-parceners, notwithstanding the general rule that the possession of one is the possession of all, yet the possession of one such tenant may become adverse to the others, upon an *actual ouster* of them or any other act amounting to a *total denial* of the rights of the others as co-tenants.³

So the possession of a lessee is that of the lessor, as long as the lease subsists, and that although no rent be paid; but when the rent is not a merely nominal one, the omission to pay it, or to make any other acknowledgment of a tenancy for a great number of years, might be evidence of an adverse possession.⁴ And even after the end of the term the lessee's possession is still not adverse, unless he does some act amounting to a disseisin, as by conveying to another.⁵

1. 2 Min. Insts. 583; 1 Lom. Dig. 799, 800; *Pownal v. Taylor*, 10 Leigh (Va.) 181; et seq., 34 Am. Dec. 725; *Rose v. Burgess*, 10 Leigh 196; *Evans v. Spurgin*, 6 Gratt. (Va.) 118, 52 Am. Dec. 105; *Creigh v. Henson*, 10 Gratt. 231; *Clarke v. McClure*, 10 Gratt. 305; *Nowlin v. Reynolds*, 25 Gratt. 141; *Chapman v. Chapman*, 91 Va. 397, 50 Am. St. Rep. 846, 21 S. E. 813; *Alleghany County v. Parrish*, 93 Va. 613, 25 S. E. 882; *Marbach v. Holmes*, 105 Va. 178, 52 S. E. 828; *Reusens v. Lawson*, 91 Va. 226, 21 S. E. 347. See ante, §§ 1033, 887, 923, 937.

2. See cases cited *supra*, note 1.

3. Va. Code, 1904, § 2736; ante, §§ 887, 923, 937; 2 Min. Insts. 473, 499, 505.

4. 2 Min. Insts. 584; 1 Lom. Dig. 801.

5. 2 Min. Insts. 584; *Wiseley v. Findlay*, 3 Rand. (Va.) 367, 15 Am. Dec. 712; *Reusens v. Lawson*, 91 Va. 226, 21 S. E. 347; *Neff v. Ryman*, 100 Va. 521, 42 S. E. 314.

§ 1040. Same—3. Where Occupant Has Acknowledged Claimant's Title.

Where the occupant has acknowledged title to be in the claimant during the statutory period, the possession of the occupant is not deemed *adverse*, the acknowledgment negating such a conclusion.¹ In England, the acknowledgment of the title, in order thus to alter the effect of the occupant's possession, must be *in writing*,² but in Virginia, there is no such requirement.

§ 1041. Actual and Constructive Possession of Occupant under Color of Title—I. General Common Law Doctrine.

While, in order that an occupant's possession may ripen into a legal title under the statute of Limitations, it is a general rule that his possession must be *actual*, and that a mere *constructive* possession (arising from the possession of a *deed* or other *paper title* describing the boundaries of the land claimed thereunder), though for the statutory period, will not suffice,¹ yet an *actual*

1. 2 Min. Insts. 585; 1 Lom. Dig. 801; *Roe v. Farrars*, 2 Bos. & P. 546; *Hatcher v. Fineaux*, 1 Ld. Raym. 740; *Jackson v. Sears*, 10 Johns. (N. Y.) 435, 441; *Hunt v. Hunt*, 3 Met. (Mass.) 175; *Burghardt v. Turner*, 12 Pick. (Mass.) 534; *Pratt v. Vattier*, 9 Pet. 416.

2. 2 Min. Insts. 571; Williams, Real Prop., 416, 417.

1. 2 Min. Insts. 579, 580; 2 Tiffany, Real Prop., § 441; *Ward v. Cochran*, 150 U. S. 597; *White v. Burnley*, 20 How. 235; *Lipscomb v. McClellan*, 72 Ala. 151; *Walker v. Hughes*, 90 Ga. 52; *Christy v. Waterworks*, 97 Cal. 21. Possession may sometimes be *constructive only*. Thus, when the *commonwealth* grants lands to a first patentee, it puts him *constructively* into possession, notwithstanding at the time of the emanation of the patent there was an actual occupation of the premises by another person, for such person's possession (as the *commonwealth* is incapable of being disseised), *cannot be adversary*. And such elder patentee's seisin continues until some one actually enters by a *pedis positio* under an adverse claim of title, when the grantee being dispossessed, the statute of Limitations begins to run against him, and in a competent time, if the actual adversary possession *continues*, will bar his claim; but a junior grant from the *commonwealth* does not of itself have the effect of determining the first patentee's (1118)

possession of part of the land in dispute may sometimes aid a *constructive possession* of the rest, so as to permit the adverse occupant to acquire title to the *whole* after the lapse of the statutory period.²

In other words, as a common law principle, the actual possession of a *part* of a tract of land in dispute, claimed under a *paper title* (that is, under *color of title*), may sometimes be construed as a possession of the *whole* tract, so as to give the occupant a title thereto after the statutory period,—upon the principle that one who has notice of an *actual adverse occupancy of part* of his land under a claim based upon a written document defining the boundaries claimed, is also chargeable with notice that the claim is limited only by the terms of the document itself, supposing the boundaries to be described therein with sufficient

constructive seisin. Hence, where a patentee of the commonwealth, having no *actual*, but only the *constructive* seisin arising from the commonwealth's grant, brings an action against an occupant of the land who claims title by possession, it is competent to the defendant to prove a prior commonwealth's grant (although he has no privity with the grantee therein), because that defeats the plaintiff's *constructive* seisin, by an adverse constructive seisin in the first patentee, and so destroys all title to recover of the occupant, the plaintiff having neither actual nor constructive possession. 2 Min. Insts. 579, 580; Va. Code, 1904, § 2735; Dawson v. Watkins, 2 Rob. (Va.) 259; Taylor v. Burnside, 1 Gratt. (Va.) 165, 201, et seq.; Green v. Watkins, 7 Wheat. 27; Green v. Liler, 8 Cr. 229; Shanks v. Lancaster, 5 Gratt. 110, 50 Am. Dec. 108; Koiner v. Rankin, 11 Gratt. 420; Cline v. Catron, 22 Gratt. 392; Carter v. Hagan, 75 Va. 557; Sulphur Mines Co. v. Thompson, 93 Va. 295, 25 S. E. 232; Harman v. Ratliff, 93 Va. 249, 24 S. E. 1023; Stull v. Rich Patch Iron Co., 92 Va. 253, 23 S. E. 293; Fry v. Stowers, 98 Va. 417, 36 S. E. 482; Howdshell v. Krenning, 103 Va. 30, 48 S. E. 491; Green v. Pennington, 105 Va. 801, 54 S. E. 877.

2. 2 Min. Insts. 582; Overton v. Davisson, 1 Gratt. (Va.) 223, 224, 42 Am. Dec. 544; Koiner v. Rankin, 11 Gratt. 427, 428; Cline v. Catron, 22 Gratt. 392; Turpin v. Saunders, 32 Gratt. 37, et. seq.; Stull v. Rich Patch Iron Co., 92 Va. 253, 23 S. E. 293. See Harman v. Ratliff, 93 Va. 249, 24 S. E. 1023; Sulphur Co. v. Thompson, 93 Va. 295, 25 S. E. 232; Fry v. Stowers, 98 Va. 417, 36 S. E. 482, 6 Va. Law Reg. 258, 263, note; Sharp v. Shenandoah Furnace Co., 100 Va. 27, 40 S. E. 103.

(1119)

accuracy to identify them, the *validity* of the document being immaterial.³

Such notice, however, cannot be reasonably charged to the first grantee unless the adverse claimant *actually occupies part* of the land *owned by the former*, for he cannot be supposed to be put upon inquiry by reason of the fact that the adverse claimant is in actual possession of *his own* land or of that of a *third person*, but only where he is in occupancy of the land of the first grantee. Hence the junior grantee must be in actual possession of part of the *land in dispute* (the *interlock*," as it is called), in order that the principle "possession of *part* is the possession of the *whole*" shall apply.⁴

Moreover, the constructive possession is dependent for its effect upon the actual possession of part of the land in dispute, and continues or fails with it. Consequently, if the occupant conveys that part of the tract which constituted his actual possession, but not the whole tract, he loses his constructive possession of the residue, unless he takes actual possession of some part thereof, or rather, he loses the benefit that might attach to a *constructive possession aided by an actual possession of part*.⁵

3. *Koiner v. Rankin*, 11 Gratt. (Va.) 427; *Stull v. Rich Patch Iron Co.*, 92 Va. 275, 277, 281, 23 S. E. 293; *Sulphur Mines Co. v. Thompson*, 93 Va. 293, 319, 25 S. E. 232; *Sharp v. Shenandoah Furnace Co.*, 100 Va. 27, 40 S. E. 103; *Green v. Pennington*, 105 Va. 801, 54 S. E. 877; *Wright v. Mattison*, 18 How. 50; *Carter v. Chevalier*, 108 Ala. 563; *Reddick v. Long*, 124 Ala. 260; *Ellington v. Ellington*, 103 N. C. 54; *Davis v. Stroud*, 104 N. C. 484; *Jackson v. Woodruff*, 1 Cow. (N. Y.) 276, 13 Am. Dec. 525.

4. *Taylor v. Burnsides*, 1 Gratt. (Va.) 165, 191, 192; *Koiner v. Rankin*, 11 Gratt. 420; *Stull v. Rich Patch Iron Co.*, 92 Va. 276, 23 S. E. 293; *Sulphur Mines Co. v. Thompson*, 93 Va. 293, 321, 25 S. E. 232; *Green v. Pennington*, 105 Va. 801, 54 S. E. 877; *Garrett v. Ramsey*, 26 W. Va. 345; *Hole v. Rittenhouse*, 25 Penn. St. 491; *Turner v. Stephenson*, 72 Mich. 409; *Bailey v. Carleton*, 12 N. H. 9, 37 Am. Dec. 190. See 2 Tiffany, Real Prop., § 444.

5. *Sharp v. Shenandoah Furnace Co.*, 100 Va. 33, 40 S. E. 103; *Trotter v. Cassady*, 3 A. K. Marsh. (Ky.) 365; *West v. McKinney*, 92 Ky. 638; *Cunningham v. Robertson*, 1 Swan (Tenn.) 137; *Chandler v. Rushing*, 38 Tex. 591.

(1120)

At common law, the application of these principles seems to be confined to those cases where the rightful owner (the senior grantee) has *no actual possession of any part* of his tract; for the principles apply equally to both grantees, and the actual possession of part of his tract by the rightful owner constitutes on his part also a constructive possession of the whole. And as between the two *constructive* possessions of that part of the land in dispute (the interlock) *not actually occupied by either*, the senior grantee having the *eldest*, as well as the *rightful*, seisin should prevail, thus confining the *junior* grantee to that part of the interlock *actually occupied by him*.⁶

But if the *senior* grantee be not in actual possession of any part of his tract, the common law principle above mentioned applies, and the *junior* grantee's *actual* possession of part of the interlock will aid his *constructive* possession of the remainder so as to make it superior to the *purely constructive* possession of the senior grantee, thus giving the *junior* grantee adverse possession of the *whole interlock*, which, if held long enough, will ripen into a perfect title.⁷

§ 1042. Same—II. Doctrine under Virginia Statute.

As early as 1792, it was enacted in Virginia that "In a controversy affecting real estate, possession of *part* shall *not* be construed as possession of the whole, where *actual adverse possession* can be proved."¹

The proper construction of this statute has been much debated; it being contended, on the one hand, that the statute applies only to the *land in controversy* (the *interlock*), but applies to the possession of the *junior*, as well as of the *senior*, grantee;²

6. *Green v. Liter*, 8 Cr. 229; *Hunt v. Wickliffe*, 2 Pet. 201; *Hunnicut v. Peyton*, 102 U. S. 333, 369.

7. *Taylor v. Burnside*, 1 Gratt. (Va.) 163, 191, 192; *Overton v. Davisson*, 1 Gratt. 223, 224, 42 Am. Dec. 544; *Koiner v. Rankin*, 11 Gratt. 427; *Stull v. Rich Patch Iron Co.*, 92 Va. 253, 275, et seq., 23 S. E. 293; *Harman v. Ratliff*, 93 Va. 255, 24 S. E. 1023; *Green v. Pennington*, 105 Va. 804, 54 S. E. 877.

1. Va. Code, 1904, § 2740.

2. 3 Va. Law Reg. 843; 5 Va. Law Reg. 810. See *Sulphur Mines* (1121)

and on the other, that it applies only to the possession of the senior grantee, but to his possession of his tract either *inside* or *outside the interlock*.³

Another difference of opinion as to the interpretation of the statute relates to the propriety of inferring from its language a *corollary* to the effect that "in a controversy affecting real estate, possession of *part shall* be construed as possession of the *whole*, if *no* actual adverse possession can be proved."⁴ This, while not a *necessary* inference from the language of the statute, would seem to be a *reasonable* one; the form which the corollary would finally assume, depending upon the adoption of one or the other interpretation of the statute above adverted to.

The significance of these differences of view will more fully appear in the succeeding sections, wherein the principles mentioned in this and the preceding section are applied to concrete cases.

The cases which will be therein considered are the following: (1) Adverse possession under claim of right, but *without color of title* (that is, without *written* evidence of title); (2) Two purely *constructive* possessions under color of title; (3) Junior grantee in actual occupancy *outside* (but *not inside*) the interlock; (4) Both senior and junior grantees in actual possession of *parts of the interlock*; (5) Junior grantee in actual possession of part of the interlock, while the senior is not in actual possession of any part of his tract; (6) Junior grantee in actual possession of part of the interlock, while senior is in actual possession of part of his tract *outside* (but *not inside*) the interlock.

§ 1043. Same—1. Adverse Possession under Claim of Right, but without Color of Title.

Where one enters, not under any deed or written muniment of title, but merely assumes the possession under a claim of right,

Co. v. Thompson, 93 Va. 293, 321, 25 S. E. 232; Green v. Pennington, 105 Va. 801, 54 S. E. 877.

3. 3 Va. Law Reg. 763; 4 Va. Law Reg. 1, 8, 127, 557; Fry v. Stowers, 98 Va. 417, 36 S. E. 482, 6 Va. Law Reg. 258, 260, 263, note.

4. 3 Va. Law Reg. 763, 843; 4 Va. Law Reg. 127, 138; 5 Va. Law Reg. 810; 6 Va. Law Reg. 1.

(1122)

his ouster of his predecessor and his own subsequent adverse possession extends no further than to the land he actually occupies, cultivates, encloses, or otherwise excludes the rightful owner from.¹

§ 1044. Same—2. Two Purely Constructive Possessions under Color of Title.

Where there are two successive conflicting grants, covering in part the same land, neither grantee entering into *actual occupancy of any part* of the land granted, there is no ground for the operation of the Virginia statute above quoted,¹ which is applicable, under any construction of it only where one, at least, of the grantees has *actual possession* of part of the land. Hence, the common law principles apply.

As between two *purely constructive* possessions (neither being aided by any actual possession), the *senior* constructive possession will prevail. A senior and rightful constructive possession can never be abrogated by a junior and unlawful possession, which is itself merely constructive.²

§ 1045. Same—3. Junior Grantee in Actual Occupancy Outside (but Not Inside) the Interlock.

According to the common law principles already considered,¹ the *junior* grantee's *constructive* possession of the interlock (which rightfully belongs to the senior grantee) cannot be aided by his actual occupancy of land which is rightfully *his own*, *outside* the interlock, for the senior grantee is not thereby put

1. 2 Min. Insts. 581; *Stull v. Rich Patch Iron Co.*, 92 Va. 253, 277, 23 S. E. 293; *Va. Midland R. Co. v. Barbour*, 97 Va. 122, 33 S. E. 554; *Sulphur Mines Co. v. Thompson*, 93 Va. 319, 25 S. E. 232; *Creekmur v. Creekmur*, 75 Va. 430, 436; *Kincheloe v. Tracewells*, 11 Gratt. (Va.) 605.

1. Ante, § 1042; Va. Code, 1904, § 2740.

2. *Taylor v. Burnsides*, 1 Gratt. (Va.) 169, 200; *Overton v. Davisson*, 1 Gratt. 211, 42 Am. Dec. 544; *Harman v. Ratliff*, 93 Va. 253, 24 S. E. 1023; *Sulphur Mines Co. v. Thompson*, 93 Va. 293, 321, 25 S. E. 232; *Green v. Pennington*, 105 Va. 801, 54 S. E. 877.

1. Ante, § 1041.

on notice of the junior's muniment of title, or of his claim to any part of the senior's tract.²

It is entirely immaterial in such case whether the senior grantee is in actual possession of part of the interlock, or indeed of any part of his grant. Even his mere *constructive* possession of the interlock, unaided by any actual possession, cannot be destroyed or affected except by the junior's *actual occupancy of some part of the interlock*.³

Nor does the Virginia statute, providing that "In a controversy affecting real estate, possession of *part* shall not be construed as possession of the *whole*, where actual adverse possession can be proved"⁴ affect this result. For whether the statute be construed to apply to *actual adverse possession of part of the interlock only* by either grantee, or whether it be construed to apply to the possession of any part of the *senior grantee's tract*,⁵ it can have no application where the *junior grantee* has no actual possession of *any part of the interlock*.⁶

§ 1046. Same—4. Both Senior and Junior Grantees in Actual Occupancy of Part of the Interlock.

(1) If the senior grantee is in *actual* possession of part of the *interlock at the time* when the junior grantee enters thereon and actually occupies another part thereof, a case is presented where the senior grantee's *constructive* possession of that portion of the

2. Taylor v. Burnsidcs, 1 Gratt. (Va.) 191, 192; Koiner v. Rankin, 11 Gratt. 420; Stull v. Rich Patch Iron Co., 92 Va. 276, 277, 23 S. E. 293; Sulphur Mines Co. v. Thompson, 93 Va. 293, 321, 25 S. E. 232; Green v. Pennington, 105 Va. 801, 54 S. E. 877.

3. 2 Min. Insts. 582; Taylor v. Burnsidcs, 1 Gratt. (Va.) 196, 197; Overton v. Davisson, 1 Gratt. 223, 224, 42 Am. Dec. 544; Koiner v. Rankin, 11 Gratt. 427, et seq.; Cline v. Catron, 22 Gratt. 392; Turpin v. Saunders, 32 Gratt. 37, et seq.; Stull v. Rich Patch Iron Co., 92 Va. 280, 23 S. E. 293; Sulphur Mines Co. v. Thompson, 93 Va. 321, 25 S. E. 232; Harman v. Ratliff, 93 Va. 253, 24 S. E. 1033; Green v. Pennington, 105 Va. 801, 54 S. E. 877.

4. Va. Code, 1904, § 2740.

5. Ante, § 1042.

6. See cases cited *supra*, notes 2, 3.

interlock not actually occupied by either is superior to the junior grantee's *constructive* possession of the same, the *actual* possessions of the two either cancelling each other, or else, the senior grantee's *actual* possession being prior to that of the junior, *strengthens* the already existing superiority of the senior's constructive possession. Hence, in this case, it is well settled that the junior grantee gains no adverse possession of any part of the interlock beyond the limits of his actual occupation, enclosure, cultivation, or use.¹

The Virginia statute, already quoted,² would seem not to affect this result in any way, whichever interpretation be placed upon it.

(2) It is as yet undetermined what the result is, if the senior grantee does not enter upon nor occupy part of the *interlock* until *after* the junior grantee has done so, but does so before the expiration of the statutory period of adverse possession gives the junior a title to the interlock. It would seem, however, that this should destroy the junior's potential title to, and the superiority of his constructive possession of, the interlock beyond the limits of his actual occupation, though this conclusion is not altogether free from doubt.

In such case the question is whether the senior's *earlier constructive* possession of the interlock, aided by his *later actual* occupation of part thereof, is superior to the junior's *later constructive* possession of the interlock, aided by his *earlier actual* occupation thereof. Since the senior is presumably *notified* of the junior's claim to the interlock only from the time of the latter's occupation thereof, it is believed that the senior should be permitted to put an end to this claim by an actual occupation of *part only* of the interlock, without compelling him to occupy the whole or all beyond the limits of the junior's actual holding.

1. 2 Min. Insts. 582; *Overton v. Davisson*, 1 Gratt. (Va.) 224, 42 Am. Dec. 544; *Koiner v. Rankin*, 11 Gratt. 420; *Cline v. Catron*, 22 Gratt. 392; *Turpin v. Saunders*, 32 Gratt. 37, et seq. 40.

2. Va. Code, 1904, § 2740. The statute reads, "In a controversy affecting real estate, possession of part shall not be construed as possession of the whole, where actual adverse possession can be proved." See ante, § 1042.

§ 1047 Same—5. Junior Grantee in Actual Possession of Part of Interlock; Senior Not in Actual Possession of Any Part of His Tract.

This is a perfectly clear case for the operation of the common law rule that "possession of part is possession of the whole,"¹ the result being in no wise affected by the Virginia statute, before quoted, under either interpretation thereof. The junior's adverse title must be held to extend to the limits of his grant, so as to include the *whole interlock*.²

§ 1048. Same—6. Junior Grantee in Actual Possession of Part of Interlock; Senior in Actual Possession of Part of His Tract Outside the Interlock.

Here, also, two cases arise: (1) Where the senior grantee does not take actual possession of any part of his tract until *after* the junior actually occupies part of the interlock; and (2) Where the senior is already in actual possession of part of his tract outside the interlock *at the time* when the junior actually occupies part of the interlock.

(1) If the senior grantee be not in actual possession of *any part of his tract* at the time when the junior grantee occupies part of the *interlock*, but *afterwards* and before the lapse of the statutory period, actually occupies part of his tract *outside the interlock*, this belated actual possession outside of the land in controversy will not aid the senior grantee's *constructive* possession of the *interlock*, so as to make it superior to the junior's combined *actual and constructive* possession of the interlock. In other words, the junior's *later constructive* possession of the interlock, when aided by his *actual* possession of part thereof, is superior to the senior's *earlier constructive* possession of the interlock, aided by a *later actual* possession of part of the tract *outside the interlock*.¹

This result is clearly correct, under the Virginia statute pro-

1. Ante, § 1041.

2. Ante, § 1041, and the authorities there cited.

1. Stull v. Rich Patch Iron Co., 92 Va. 253, 23 S. E. 293.

viding that "In any controversy affecting real estate, possession of part shall not be construed to be possession of the whole, where actual adverse possession can be proved,"² or the very reasonable *corollary* inferred therefrom, namely, that "possession of part shall be construed as possession of the whole, if no adverse possession can be proved,"³ if the interpretation of the statute be adopted which applies it to the *land affected by the controversy*, that is, the *interlock*, alone, and applies it to the possession of either the *junior* or the *senior* grantee.⁴

But if the other interpretation of the statute (and its resulting corollary) be adopted, namely, that it applies to the *entire tract* of the *senior* grantee (both outside and inside the interlock) but has no application to the *junior's possession*,⁵ it would seem that the senior's constructive possession of the part of the interlock not in the junior's actual occupation would be superior to the junior's constructive possession of the same. But this result is contrary to the actual decision.⁶

(2) If the senior grantee be in actual possession of part of his tract *outside the interlock at the time* of the junior grantee's actual occupation of *part of the interlock*, here again, the result turns upon the interpretation of the statute and the consequent terms of the corollary to be inferred therefrom. Under the first interpretation, above mentioned, the junior's possession of the interlock is clearly superior;⁷ under the latter, the senior grantee's constructive possession of the interlock, though aided

2. Va. Code, 1904, § 2740.

3. Ante, § 1042.

4. Ante, § 1042. Under this construction of the statute, the corollary would read as follows: "Possession of part [of the interlock by the junior grantee] shall be construed as possession of the whole [interlock], if no adverse possession [by the senior grantee] can be proved.

5. Ante, § 1042. In this case the corollary would read as follows: "Possession of part [of the senior grantee's tract, either outside or inside the interlock, by the senior] shall be construed as possession of the whole [tract of the senior grantee] if no adverse possession can be proved."

6. *Stull v. Rich Patch Iron Co.*, 92 Va. 253, 23 S. E. 293.

7. 3 Va. Law Reg. 843; 5 Va. Law Reg. 810.

only by his actual possession *outside the interlock*, is superior to the junior's constructive possession of the interlock, though aided by his actual possession *inside the interlock*.⁸

Whatever may be thought of the question from the standpoint of principle, the Virginia court has decided in favor of the latter view.⁹

§ 1049. Effect of Acquisition of a New Right by the Rightful Claimant.

Where a claimant acquires a new right, he is allowed a new period to pursue his remedy, though he has neglected the first. Thus, a remainderman expectant on an estate for life or years, to whom a right to enter or bring an ejectment is given by a forfeiture or an eviction incurred by the tenant for life or years, is *not bound* to do so; so that if he comes with his action within fifteen years after the *remainder attached*, it will be in time, although more than fifteen years have elapsed since his title by means of the forfeiture accrued.¹

And so a reversioner may enter at any time within fifteen years after the *termination of the particular estate*, notwithstanding there may have been a *disseisin of the particular tenant*, and an adverse possession for more than fifteen years; for the proper title of the reversioner does not accrue until the particular estate is at an end.²

So, also, in the case of a future *contingent* limitation, whether by way of remainder or executory limitation, since the party's title under it does not accrue until the happening of the contingency entitles him to the possession, the statute does not begin to run against *him* until that time.³

8. See 3 Va. Law Reg. 763; 4 Va. Law Reg. 1, 8, 127, 138, 557; 5 Va. Law Reg. 810; 6 Va. Law Reg. 1.

9. Fry v. Stowers, 98 Va. 417, 36 S. E. 482, 6 Va. Law Reg. 258, 260, 263, note.

1. 2 Min. Insts. 585; 1 Lom. Dig. 862; Kemp v. Westbrook, 1 Ves. Sr. 278, 279.

2. 2 Min. Insts. 585; 1 Lom. Dig. 802.

3. 2 Min. Insts. 578; Clarkson v. Booth, 17 Gratt. (Va.) 490, 498, et seq.; Layne v. Norris, 16 Gratt. 236, 239, et seq.; Elys v. Wynne, 22 Gratt. 229. See 5 Va. Law Reg. 55.

§ 1050. Nature of Claimant's Entry in Order to Oust an Adverse Occupant.

The entry must, of course, appear to have been upon the land claimed, and it must also appear that it was not a mere *casual entry*, but made *animo clamandi*, intending to assert his claim and was followed by a possession, continuous and actual, by means of residence, improvement, cultivation, or other open, notorious, and habitual acts of ownership.¹

It is admitted that an entry into one of several parcels of land in the same county may avail as an entry into all, provided the entry is made in the name of all, and the several parcels are, as to the freehold, in the hands of the same person. But if the freehold is in different parties, or if it be in different counties, or if the entry is not made in the name of all the parcels, it is good for no more than the parcel actually entered upon. Hence, if there be three several disseisors of different parcels, as each is a several tenant of the freehold of his parcel, there must be a separate entry upon every one, and not upon one in the name of all. So, also, there must be a separate entry if a disseisor of an entire parcel let the land for life, say in three parcels, to three several tenants. But if, in the latter case, he should let it *for years* to three several tenants, an entry into any one of the parcels, in the name of all, will serve for the whole.²

And it should be observed that the entry of the equitable owner (*e. g., cestui que trust*), is as effective to repel the bar

1. 2 Min. Insts. 585; 1 Lom. Dig. 802; *Ewing v. Burnet*, 11 Pet. 53; *Barclay v. Howell*, 6 Pet. 513; *Dawson v. Watkins*, 2 Rob. (Va.) 269, 270; *Overton v. Davisson*, 1 Gratt. (Va.) 217, 225, 42 Am. Dec. 544; *Taylor v. Burnside*, 1 Gratt. 165, 208, 210; *Green v. Pennington*, 105 Va. 806, 54 S. E. 877. The party in possession "cannot be disseised or ousted except by an actual invasion of his boundary by some act or acts palpable to the senses, and which will serve to admonish him that his seisin is molested; otherwise, he might be disseised of his freehold not only without his knowledge, but without the possibility of his knowing it." *Green v. Pennington*, *supra*.

2. 2 Min. Insts. 585, 586; 3 Th. Co. Lit. 15, et seq.; Angell, *Lim'ns*, § 377.

of the statute of Limitations as that of the possessor of the *legal title*.³

§ 1051. Application of Statute of Limitations to Land in Equity—In General.

There are limitations *expressly imposed* in Virginia to bar *suits in equity* in only two classes of cases, namely: 1st, In case of gifts, conveyances, assignments, transfers or charges which are *not on consideration deemed valuable in law*, where the suit of any creditor to vacate them is limited to *five years* after the right to avoid such gifts has accrued; and 2ndly, In case of grants of land by the *Commonwealth*, in order to repeal the same in whole or in part, in which case the suit must be brought within *ten years* next after date of the grant; reserving in both cases, to persons who at the time the right accrues, are under the disabilities of infancy or insanity, the same time after the removal of the disability as at first, but in no case to exceed twenty years from the right accrued.¹

The limitations to suits prescribed in all other instances relate to actions or proceedings in the courts of *law*; and by the earlier statutes fixing the periods within which proceedings must be had, as well with us as in England, no cases at all in chancery are included. Limitations to suits, however, being recognized as a wholesome policy, and having, indeed, prevailed in the courts of chancery, although with no definite periods, from the origin of their extraordinary jurisdiction, in consequence of their reasonable wish to discountenance *laches* and neglect, when the legislature prescribed certain fixed periods within which actions at law must be set on foot, equity had no difficulty in adopting by analogy similar periods in corresponding cases, especially as to do so was in accord with one of its professedly favorite maxims that *equity follows the law*. Thus, in cases of equitable titles to lands, equity requires relief to be sought

3. 2 Min. Insts. 586; 1 Lom. Dig. 803; *Gree v. Rolle*, 1 Ld. Raym. 716.

1. Va. Code, 1904, §§ 2929, 2930; *Snoddy v. Haskins*, 12 Gratt. (Va.) 368; 2 Min. Insts. 586.

within the same period in which an *ejectment* would lie at law; and in cases of equitable personal claims, it also requires relief to be sought within the period prescribed for legal demands of a like nature.²

Indeed, when the demand is strictly of a *legal nature*, but it is more convenient for some particular reason, under the circumstances, to invoke the aid of chancery, the court of equity governs itself *absolutely by the same limitations* as are prescribed by the statute for such cases, not so much on the ground of *analogy*, as positively in obedience to the statute.³

But there are some cases where equity, not being bound by the *terms* of the statute of Limitations, has not deemed it politic and wise to be ruled by its provisions. The most notable instances of this are cases of *trust*, and of *fraud*.⁴ These will be considered in the following sections.

§ 1052. Same—Cases of Trust in Equity Not within the Statute of Limitations.

The proposition that a trust is not within the statute of Limitations applies, of course, only as between *cestui que trust* and trustee, and not as between those parties on the one side and a stranger on the other. In this latter case the statute is as much applicable as if no trust were concerned.¹

But as between *cestui que trust* and trustee (if the trust be express or constituted by the act of the parties), the possession of the trustee can never be adverse to *cestui que trust*, and therefore no length of possession can bar the latter's title. Where the trust is forced by the doctrines of equity upon the conscience

2. 2 Min. Insts. 586, 587; 1 Lom. Dig. 809, 810; 1 Story. Eq. Jur., §§ 55a, 529; Angell, Lim'ns, § 25, et seq.; Redford v. Clarke, 100 Va. 120, 121, 40 S. E. 630.

3. 2 Min. Insts. 587; 1 Story, Eq. Jur., § 529; 2 Story, Eq. Jur., § 1520; Angell, Lim'ns, 26; Hovenden v. Lord Annesley, 2 Sch. & Lefr. 607, 629, 630; Redford v. Clarke, 100 Va. 120, 121, 40 S. E. 630.

4. 2 Min. Insts. 587.

1. 2 Min. Insts. 587; 1 Lom. Dig. 810; Harmood v. Oglander, 6 Ves. 415; Redford v. Clarke, 100 Va. 120, 40 S. E. 630.

of the trustee (that is, in case of *constructive* trusts), in consequence of his fraudulent conduct, etc., this proposition requires to be somewhat qualified. In that case, when the party beneficially concerned becomes cognizant of the fraud, etc., the possession of the *quasi* trustee is adverse from the time the fraud, etc., is discovered, and from that time the statute runs.²

§ 1053. Same—Cases of Fraud in Equity Not within the Statute.

When *fraud* is charged, the defendant cannot plead the statute of Limitations to the discovery of his title (at least, he cannot do it except from the time the claimant became cognizant of the fraud), but he must answer to the fraud.¹

The Virginia statute of "Voluntary Conveyances," as we have seen,² restricts the proceeding in equity or otherwise, to set aside a conveyance alleged to be fraudulent as to creditors, etc., because *not for valuable consideration*, to five years from the time the right to avoid the conveyance has accrued;³ but this provision does not apply where there is an *actual fraud*. Cases of actual fraud are governed by the principles applicable to *constructive* trusts, already stated, that is, the statute begins to run from the time the fraudulent intent came to the knowledge of the parties concerned, or from the time when the creditor's execution or judgment was delayed, hindered, or defrauded by the operation of the fraudulent conveyance.⁴

2. 2 Min. Insts. 587; 1 Lom. Dig. 810; 2 Story, Eq. Jur., § 1521; Angell, Lim'ns, §§ 30, 183, 471; Beckford v. Wade, 17 Ves. 97; Shepard v. Turpin, 3 Gratt. (Va.) 395; Rowe v. Bentley, 29 Gratt. 760, 761; Massie v. Heiskell, 80 Va. 789, 804; Redford v. Clarke, 100 Va. 120, 121, 40 S. E. 630. As to legacies charged on lands, see 1 Lom. Dig. 813; Jones v. Turberville, 2 Ves. Jr. 11.

1. 2 Min. Insts. 587, 588; 1 Lom. Dig. 183; Angell, Lim'ns, §§ 30, 183, et seq.; Cresap v. McLean, 5 Leigh (Va.) 381, 389.

2. Ante, § 1051.

3. Va. Code, 1904, § 2929.

4. 2 Min. Insts. 588; 2 Story, Eq. Jur., § 1521; Snoddy v. Haskins, 12 Gratt. (Va.) 363; Wilson v. Buchanan, 7 Gratt. 334; Rowe v. Bentley, 29 Gratt. 760; Massie v. Heiskell, 80 Va. 789, 804; Redford v. Clarke, 100 Va. 120, 40 S. E. 630.

(1132)

But although this right may remain unasserted for a period long enough to raise a bar to its assertion, even in equity; yet the forbearance may be satisfactorily accounted for, not only by the savings in the statute, of infancy and insanity, but sometimes by other circumstances also, as by the fact that the adverse claimant was amused and diverted from the purpose to sue, by proposals of compromise or adjustment, etc.⁵

5. 2 Min. Insts. 588; 1 Lom. Dig. 814; *Eustace v. Gaskins*, 1 Wash. (Va.) 188.

(1133)

CHAPTER XL.

TITLE BY PRESCRIPTION.

- § 1054. Outline of Discussion.
- 1055. Nature of Title by Prescription.
- 1056. Title by Prescription Distinguished from Rights Exercised under Local Custom.
- 1057. Kind of Property Acquirable by Prescription.
- 1058. The Prescriptive Period—In General.
- 1059. Same—Allowance for Disabilities of Rightful Owner.
- 1060. Extent of Right Acquired by Adverse User.
- 1061. Continuity of User Necessary.
- 1062. Effect of Mere Protests on Part of True Owner upon the Adverse User.
- 1063. Notoriousness of Adverse User.
- 1064. Exclusiveness of Enjoyment.
- 1065. Hostile Character of User.
- 1066. Same—Criterion of Hostile User.
- 1067. No Estate Less than One of Inheritance Can Be Acquired by Prescription.
- 1068. Distinction in Pleading between Prescribing in a Que Estate and in Oneself and One's Ancestors.

§ 1054. Outline of Discussion.

We shall examine title by prescription under the following heads: (1) Nature of title by prescription; (2) Title by prescription distinguished from rights exercised under local custom; (3) Kind of property acquirable by prescription; (4) The prescriptive period; (5) Extent of right acquired by adverse user; (6) Continuity of possession necessary; (7) Effect of mere protest on the part of the true owner upon the adverse user; (8) Notoriousness of the adverse user; (9) Exclusiveness of the adverse user; (10) Hostile character of the user; (11) The criterion of a hostile possession, and its application; (12) No title less than estate of inheritance can be acquired by prescription; (13) Distinction in pleading between prescribing in a *que estate* and in *oneself and one's ancestors*.

(1134)

§ 1055. Nature of Title by Prescription.

The statute of Limitations, discussed in the preceding chapter, applies only to one's loss of his *land* by adverse possession, providing that, after the statutory period, no entry upon nor action for land shall be allowed.¹

But by the *common law*, when a person (and those under whom he claims) has been used to enjoy certain *incorporeal* property *immemorially*, that is, for a time such that the memory of man (whether by the proper knowledge of any man living, or by record or sufficient matter of writing), runneth not to the contrary, and his possession has been also *honest, uninterrupted and adverse*, he acquires thereby what is known as a *title by prescription*; which is founded on the natural presumption that he who has a quiet and uninterrupted possession for a certain number of years, has a just right to the subject possessed, or else he would not have been suffered to continue in the enjoyment of it. Such protracted acquiescence on the part of other claimants in an *adverse* possession, supposing it to be *honest* and unaccompanied by fraud, necessarily supposes some good reason, though perhaps unknown, for which the claim was forborne, and requires in sound policy, and with a view to the peace of society, that any opposing title should be regarded as abandoned.²

§ 1056. Title by Prescription Distinguished from Rights Exercised under Local Custom.

Custom, where it operates to confer legal rights, is properly a *local law*, owing its force and effect to *immemorial continuance* in a certain local district, and is applicable, in general terms, to *all* persons and affairs in the district, which are within the purview or scope of the custom; *e. g.*, the custom of *gavel-kind*, of *borough-English*, etc.³

1. Va. Code, 1904, § 2915.

2. 2 Min. Insts. 564; 3 Bl. Com. 262; 2 Th. Co. Lit. 198; 3 Lom. Dig. 783, et seq.

3. 2 Min. Insts. 564, 565; 1 Min. Insts. 37, et seq.; 1 Bl. Com. 74, et seq.

Prescription, on the other hand, is a *source of private title to property*; or, as it is expressed by Blackstone, merely a *personal usage*; as that J. S. and his ancestors, or those whose estates he hath, have used time out of mind, to have such an advantage or privilege. Thus, a usage in the parish of D, that *all* the people may dance on a certain close, at all times, for their recreation, is a *custom*; for it applies to the place in general, and not to any *particular persons*; but if the tenant in fee of the manor of A alleges that he and his ancestors, or he and all those whose estate he hath, in the said manor, have used time out of mind to have *common of pasture* in such a close, that is properly called a *prescription*; for this is a usage annexed to the *person* of the owner of the estate, and a source merely of *private title*.⁴

There can be no *local custom* in Virginia, because when our ancestors came hither in 1607, they brought with them the *common law* of England, and the general statutes made in aid thereof, but not any *local customs*, none of which, therefore, in that year existed in the colony. If, then, any custom or local law be alleged now to exist, it is certain that it must have originated since that period, and so cannot be *immemorial*.⁵

It has been said by very high authority, that as no *custom* can be immemorial in Virginia, so neither can *prescription* be, and that the latter can no more exist than the former.⁶ This position is predicated upon the assumption that *immemoriality* is properly referable to the first year of Richard I,⁷ whence it is argued that the comparatively recent settlement of the American colonies excludes the idea of such immemorial use. The assumption, however, is mentioned by Littleton and Coke only to deny and refute it, both declaring that at common law time out of mind is limited to no certain period, but means only that the memory of man runneth not to the contrary of the matter;

4. 2 Min. Insts. 565; 2 Bl. Com. 263.

5. Ante, § 47; 2 Min. Insts. 565; Harris v. Carson, 7 Leigh (Va.) 632, 30 Am. Dec. 510; Mason v. Moyers, 2 Rob. (Va.) 606; Gross v. Criss, 3 Gratt. (Va.) 262; Delaplane v. Crenshaw, 15 Gratt. 457.

6. 1 Lom. Dig. 786; 1 Tucker, Com. B. II, 211.

7. 1 Tucker, Com. B. I, 24; 2 Bl. Com. 31; 2 Min. Insts. 565, 566. (1136)

not merely the memory, or proper knowledge of any man living, but also the knowledge by proof, as by record, or sufficient matter of writing.⁸

But even though the assumption be admitted, it must be remembered that, as prescription relates to title to property, of the first origin of which in Virginia we have no certain account, it not depending upon, but being possibly antecedent to government, even to the first landing of Europeans on these shores, so it is impossible to say that the enjoyment of certain rights *could not* have been immemorial. Accordingly, the authorities irresistibly show that there may be a title by prescription in Virginia, where the possession has been honest, uninterrupted, adverse *and immemorial*; and they show, moreover, that a continued possession for more than twenty years, if the other circumstances exist, is *conclusive proof of immemorial* enjoyment, provided such immemorial enjoyment be, in the nature of things, *possible*.⁹

§ 1057. Kind of Property Acquirable by Prescription.

Nothing but such things as *lie in grant* (at common law, *incorporeal* hereditaments) can be claimed by prescription, such as easements, rights of way, profits *a prendre*, franchises, rights to the use of water, etc. But no prescription, properly so-called, can give title to *lands* (*corporeal* hereditaments).¹

The reason for this restriction of prescriptive title to *incorporeal* rights lying in grant is not easy to discover, the peace and general interests of society requiring that the long and quiet enjoyment of *lands* should confer a title, no less than the long and quiet enjoyment of incorporeal rights. And so Bracton seems to have laid down the law: *longa enim possessio (sicut jus), parit jus possidendi, et tollit actionem vero domino*.²

8. 1 Th. Co. Lit. 36, 37; 2 Min. Insts. 565, 566.

9. 2 Min. Insts. 565, 566; 3 Kent, Com. 441; 1 Lom. Dig. 786; 2 Bl. Com. 31, n. (14); Coalter v. Hunter, 4 Rand. (Va.) 64, 15 Am. Dec. 726; Stokes v. Upper Appomattox Co., 3 Leigh (Va.) 318.

1. 2 Min. Insts. 566; 1 Lom. Dig. 787.

2. 2 Min. Insts. 566; 1 Lom. Dig. 787.

But at a very early period the diversity was established, perhaps because of the difference between the modes of transfer of the respective classes of property, the one lying *in grant* and the other in the higher and more solemn transaction of *livery*, which might cause an abandonment or surrender of the first to be more readily presumed than of the second; or possibly, it may have resulted in consequence of the enactment of a statute limiting actions for *lands*, and if not so established, it has at all events been fostered and rendered more prominent by the long succession of such statutes. Thus, Lord Coke says: "In *ancient time* the limitation in a writ of right was from the time of Hen. I.³ * * * After that by the statute of Merton (20 Hen. III, c. 8), the limitation was from the time of Hen. II, and by the statute of Westm. I (3 Edw. I, c. 39), and Westm. II (13 Edw. I, c. 46), the limitation was from the time of Rich. I, * * * since altered by a profitable and necessary statute, made *anno* 32 Henry VIII (c. 2), and by that act the former limitation in time in a writ of right is changed and reduced to sixty years next before the *teste* of writ; and so of other actions, as by the statute appeareth."⁴

Indeed, the theory of the common law seems to be that title by prescription is nothing more than the *conclusive supposition* of a grant, which by lapse of time has been *lost or destroyed*. Hence, if the right in question could not have arisen from a *grant* at all, the groundwork of the title fails. However, every prescriptive claim may be good, supposing it to be accompanied by honest, uninterrupted, adverse, and immemorial possession, wherever it might by *possibility* have had a lawful commencement.⁵

3. This would seem to have been by virtue of some statute or assize, which is not extant; the earliest statute whose complete text survives being *Magna Charta*, or 9 Hen. III. See Hale's Hist. Com. Law, 152, 156, 171, 172; 1 Reeve's Hist. Eng. Law, 264, 316; 2 Do. 124; 2 Min. Insts. 566.

4. 3 Th. Co. Lit. 230; 2 Min. Insts. 566.

5. 2 Min. Insts. 567; 2 Bl. Com. 265, n. (4); 2 Tiffany, Real Prop., § 445; *Lamb v. Crosland*, 4 Rich. L. (S. C.) 536; *Coolidge v. Learned*, 8 Pick. (Mass.) 504; *Tracy v. Atherton*, 36 Vt. 503; *Lehigh Valley R. Co. v. McFarlan*, 43 N. J. L. 605. (1138)

So, also, if the right or interest claimed can arise by matter of *record alone*, then it cannot arise by a mere *grant*. Thus, in respect to the royal franchises of *deodands*, of *felon's goods*, etc., as they are not forfeited till the matter on which they arise is found by the inquisition of a jury, and so made a matter of record, the forfeiture itself, or rather the right to the forfeiture, cannot be claimed by an inferior title. On the other hand, the franchises of treasure-trove, waifs, estrays, etc., as they exist in England, may be claimed by prescription; for they arise from contingencies *in pais*, and not from any matter of record.⁶

And so it is also in case of a right *common to all*, and hence not susceptible of special grant to one. Thus, the right of fishing in the sea being a right common to all, a prescription for such a right annexed to certain tenements is bad.⁷

It is perhaps worthy of consideration, should there be any need for it, whether the Virginia statute of Grants, enacting that "all real estate shall, as to the conveyance of the immediate freehold thereof, be deemed to *lie in grant* as well as in livery," has not thrown open *lands* themselves to acquisition by *prescription* alone, without the necessity of invoking the *statute of Limitations*.⁸

§ 1058. The Prescriptive Period—In General.

As has been pointed out, the theory of the common law is that the adverse enjoyment must have *continued immemorially*, that is, from a time whereof the memory of man runneth not to the contrary, in order that a prescriptive right to the easement or other incorporeal property may arise.¹

But practically, the courts permit such immemorial enjoyment to be *conclusively presumed* from the proof of an enjoyment for a *reasonable period*, fixed in Virginia, as well as at common law, arbitrarily at *twenty years* of honest, uninterrupted, notorious,

6. 2 Min. Insts. 567, 568; 2 Bl. Com. 265; 2 Th. Co. Lit. 200.

7. 2 Min. Insts. 568; Bac. Abr. Common (A); Ward v. Cresswell, Willes, 268.

8. Va. Code, 1904, § 2417.

1. Ante, §§ 1055, 1056; 2 Min. Insts. 564.

exclusive and adverse enjoyment, which period is not reduced, in Virginia at least, by analogy to the statute of Limitations affecting lands, to the period prescribed by the statute; but is a separate and distinct period.²

In fixing the time or event from which the computation of the period is to commence we must look to the time at which it first becomes *complete*, that is, where the other party's use and enjoyment of his land, actual or potential, is first interfered with. Thus, where the question relates to the flooding of lands by a mill dam, the date from which the computation is to commence is the date when the dam is first put in condition to stop the water, and not when the structure was first begun.³

§ 1059. Same—Allowance for Disabilities of Rightful Owner.

In those states which draw their prescriptive period from analogy to the period contained in the statutes of Limitations relating to *land*, the analogy carries the courts on to the allowance of the *same disabilities* on the part of the rightful owner as are allowed by those statutes, and subject to the same restrictions.¹

But in Virginia, where this analogy has not been recognized in respect to the *period* of adverse enjoyment,² it is very questionable whether the disabilities allowed by the statute of Limitations, or any other, shall be allowed to extend the period beyond twenty years. Indeed, to hold otherwise would be to *depart from* the analogy of the Virginia statute of Limitations,

2. 2 Min. Insts. 566; *Coalter v. Hunter*, 4 Rand. (Va.) 64, 15 Am. Dec. 726; *Stokes v. Upper Appomattox Co.*, 3 Leigh (Va.) 318; *Cornett v. Rhudy*, 80 Va. 710; *Nichols v. Aylor*, 7 Leigh (Va.) 546; *Reed v. Garnett*, 101 Va. 47, 43 S. E. 182, 8 Va. Law Reg. 723, 726; *Field v. Brown*, 24 Gratt. (Va.) 74; *Scott v. Beutel*, 23 Gratt. 1.

3. 2 Washburn, Real Prop. 49; *Branch v. Doane*, 17 Conn. 402.

1. Ante, §§ 1022, 1023; 2 Tiffany, Real Prop., § 447; *Lamb v. Crossland*, 4 Rich. L. (S. C.) 536; *Melvin v. Whiting*, 13 Pick. (Mass.) 185; *Edson v. Munsell*, 10 Allen (Mass.) 557; *Tracy v. Atherton*, 36 Vt. 503; *Mebane v. Patrick*, 46 N. C. 23; *Wallace v. Fletcher*, 30 N. H. 434; *Reimer v. Stuber*, 20 Penn. St. 458, 59 Am. Dec. 744.

2. Ante, § 1058, and cases in note 2.

which declares that in no case of disability shall the period *exceed twenty years*.

§ 1060. Extent of Right Acquired by Adverse User.

Since the right claimed is based upon continuous user for the prescriptive period, it follows that the right arises only to the extent of the *customary user*.¹ While in the case of an easement arising by *express grant* the language of the grant is to be examined to define and limit the rights of the parties,² in the case of an easement arising by *prescription*, the only way of determining these rights is by reference to the *user*, that is, the accustomed mode and extent of the enjoyment of the right claimed.³

Thus, whether one claiming a way over another's land by prescription is entitled to a footway, horseway or carriage way, depends upon the mode in which he has been *accustomed to use* his neighbor's land.⁴

§ 1061. Continuity of User Necessary.

The principles that govern the adverse user of the occupant necessary to give him a prescriptive title are for the most part identical with those governing the adverse possession of an occupant of *land* necessary to give him title under the statute of Limitations, which have been discussed pretty fully in the preceding chapter.

Thus, it is well settled that the adverse user must be *continuous and uninterrupted* throughout the prescriptive period, by which is not meant that the user must necessarily continue *every moment* of the time, day in and day out, but that it must

1. 2 Washburn, Real Prop., 41; 2 Tiffany, Real Prop., § 322.

2. Watts v. Johnson Corp., 105 Va. 520, 524, 54 S. E. 317.

3. 2 Washburn, Real Prop. 41; Watts v. Johnson Corp., 105 Va. 520, 524, 54 S. E. 317.

4. 2 Washburn, Real Prop., 41; Cowling v. Higginson, 4 M. & W. 245; Brunton v. Hale, 1 Ad. & E. 792. See Watts v. Johnson Corp., 105 Va. 524, 525, 54 S. E. 317; Wright v. Moore, 38 Ala. 593, 82 Am. Dec. 731; Bakeman v. Talbot, 31 N. Y. 366, 88 Am. Dec. 279, note.

(1141)

be *constant* in the sense wherein that term is used when applied to such rights as the one in question (involving the idea that the right of user should never have been *abandoned*, even for a moment), and that the enjoyment must not have been interrupted by acts of ownership on the part of the true owner, or of another, that would for the time being have the effect of destroying the adverse occupant's enjoyment, or rendering the right impossible of enjoyment.¹

For instance, a right of way may be acquired by prescription, if the right is exercised at the pleasure of the adverse claimant, though the exercise be only occasional,² whereas in the nature of things, the enjoyment of light or air adversely, or the use of a drain, would be automatic and more or less continuous night and day.³

Similarly, if the owner of land, over which a right of way is claimed adversely, blocks the right of way so as to render a passage *impossible*, this destroys the continuity of possession;⁴ but if he merely renders the passage *less convenient* than formerly, without blocking it altogether, it would not necessarily result in breaking the continuity.⁵ But in Virginia, it would seem that it should be given that effect, since it is held that *mere protests* on the owner's part may suffice for that purpose.⁶

Another instance of break in the continuity of the adverse user may occur where there is a time before the completion of the prescriptive period at which both the dominant and servient

1. 2 Min. Insts. 564, 566; 2 Tiffany, Real Prop., § 448; *Sears v. Hayt*, 37 Conn. 406; *Webster v. Lowell*, 142 Mass. 324; *Bodfish v. Bodfish*, 105 Mass. 317; *Messinger's Appeal*, 109 Penn. St. 290; *Gevinger v. Summers*, 24 N. C. 229.

2. *Bodfish v. Bodfish*, 105 Mass. 317; *Cox v. Forrest*, 60 Md. 74.

3. 2 Washburn, Real Prop., 46, 47.

4. 2 Tiffany, Real Prop., § 448; *Sears v. Hayt*, 37 Conn. 406; *Barber v. Clark*, 4 N. H. 380, 17 Am. Dec. 428.

5. *Webster v. Lowell*, 142 Mass. 324; *McKenzie v. Elliott*, 134 Ill. 156; 2 Tiffany, Real Prop., § 448.

6. Post, § 1062; *Reed v. Garnett*, 101 Va. 47, 43 S. E. 182, 8 Va. Law Reg. 723, note.

(1142)

estates belong to the same person, for the whole easement, if any there be, is thereby *extinguished*.⁷

It is to be observed that successive adverse users, if there be *privity* between the successors in adverse enjoyment, may, like successive adverse possessions of land, be *tacked* the one to the other, so as to aggregate the prescriptive period.⁸

§ 1062. Effect of Mere Protests on Part of True Owner upon the Adverse User.

The weight both of reason and authority is in favor of the view that *mere protests and expostulations* on the part of the true owner will have no effect whatever, so far as concerns the breaking of the continuity of enjoyment by the adverse claimant. Indeed, the fact that the owner during twenty years (or the prescriptive period) contents himself with mere protests against the use of his land, when he might and should have taken steps to prevent it, but strengthens the presumption that the adverse claimant has right on his side, and constitutes the enjoyment more hostile than before. Hence the doctrine usually accepted is that such protests cause no breach in the continuity of the adverse claimant's enjoyment.¹

But in Virginia, on the theory that the title by prescription is based entirely upon the presumption of a *grant*, lost or destroyed by lapse of time, and upon the further rather strained assump-

7. Ante, § 115; 2 Tiffany, Real Prop., § 448; *Murphy v. Welch*, 128 Mass. 489; *Stuyvesant v. Woodruff*, 21 N. J. L. 133, 47 Am. Dec. 156; *Pierre v. Fernald*, 26 Me. 436, 46 Am. Dec. 573.

8. Ante, § 1028, et seq.; 2 Tiffany, Real Prop., § 446; *Holland v. Long*, 7 Gray (Mass.) 486; *Leonard v. Leonard*, 7 Allen (Mass.) 277; *Sargent v. Ballard*, 9 Pick. (Mass.) 251; *Bradley's Fish Co. v. Dudley*, 37 Conn. 136; *Dodge v. Stacy*, 39 Vt. 558; *Ross v. Thompson*, 78 Ind. 90.

1. 2 Tiffany, Real Prop., § 448; *Angus v. Dalton*, 3 Q. B. Div. 93, 4 Q. B. Div. 172, 186; *Lehigh Valley R. Co. v. McFarlan*, 43 N. J. L. 605; *McGeorge v. Hoffman*, 133 Penn. St. 381; *Connor v. Sullivan*, 40 Conn. 26; *Jordan v. Land*, 22 S. C. 159; *Ferrell v. Ferrell*, 1 Baxt. (Tenn.) 329; *Kimball v. Ladd*, 42 Vt. 747; *Okeson v. Patterson*, 29 Penn. St. 22. *Contra*, *Chicago, etc., R. Co. v. Hoag*, 90 Ill. 339; *Reed v. Garnett*, 101 Va. 47, 43 S. E. 182, 8 Va. Law Reg. 723, note.

tion that the owner's *mere protests*, subsequently made, rebut the presumption of a previous grant, the doctrine seems established that such protests destroy the prescriptive title of the adverse claimant.² *A fortiori*, it would seem, any *acts* of his, successful or unsuccessful, the purpose of which is to stop, check or burden the other's enjoyment, accompanied by a denial of his right, would in Virginia have a like effect, though in most states they have not, if the enjoyment of the easement be still possible.³

§ 1063. Notoriousness of Adverse User.

The very fact that one party is using the land of another at all is in general a sufficiently notorious fact or soon becomes so; but cases may arise where the acts of user and enjoyment are *secretly* done, with the very purpose of working a fraud and surprise upon the owner.

The general principle is the same as in the case of adverse possession. It is not essential that the owner of the land should *actually know* of the adverse use to which his land is being put, but it is essential that the acts should be *open and notorious*, so that he may have an *opportunity to know of them*.¹

§ 1064. Exclusiveness of Enjoyment.

Here also the principle is the same in the case of prescription as in the case of adverse possession, namely, that the adverse user must be *exclusive*, but the application is somewhat different; for the *prescriptive* right claimed is merely the right to *use*, not to *occupy*, the owner's *land*, and it is by no means necessarily inconsistent with the *exclusiveness* of the claimant's use

2. Reed v. Garnett, 101 Va. 47, 43 S. E. 182, 8 Va. Law Reg. 723, 726, note. See Nichols v. Aylor, 7 Leigh (Va.) 546; Field v. Brown, 24 Gratt. (Va.) 74.

3. Ante, § 1061; Webster v. Lowell, 142 Mass. 324; McKenzie v. Elliott, 134 Ill. 156; Sears v. Hayt, 37 Conn. 406; Barker v. Clark, 4 N. H. 380, 17 Am. Dec. 428.

1. Ante, § 1033; 2 Min. Insts. 564, 566. See Hunter v. Spottswood, 1 Wash. (Va.) 145; Kitty v. Fitzhugh, 4 Rand. (Va.) 600; Evans v. Spurgin, 11 Gratt. 623; Rowe v. Bentley, 29 Gratt. 760; Massie v. Heiskell, 80 Va. 789, 804; Green v. Pennington, 105 Va. 801, 54 S. E. 877. (1144)

of the land, that others also claim the right to *use* it, or that the owner *uses* it in the same way, provided the claimant's user is based upon a claim of right *independent* of the others, and provided such other's use of the land does not interrupt his enjoyment of it.¹

Thus, where one claims a right of way by prescription over another's land, the fact that there is a *road* or *path* over which he goes, and that such road or path is used by others or by the owner, as well as by himself, does not prevent him from acquiring the right by prescription to pass over the way; nor is his acquisition of such right in the least inconsistent with a like acquisition by others, either by grant or prescription, the right of each being exclusive of the rights of the others.²

But if his user be merely *in common* with the rest of the community or with a certain *class*, and under no *individual* claim of right, while he might thus, in England perhaps and in some of these states, claim a right by *local custom*,³ he could claim none by *prescription*, and in Virginia, could claim in neither way.⁴

§ 1065. Hostile Character of the User.

The user must be *hostile* or *adverse* to the true owner, that is, it must not be by his *permission* or *license*, though it is not essential that it should be actually against his will or consent (which would involve the owner's *actual knowledge* of the adverse user).¹

1. 2 Tiffany, Real Prop., § 449; Ballard v. Demmon, 156 Mass. 449; Webster v. Lowell, 142 Mass. 324; Wanger v. Whipple (Penn.), 13 Atl. 81; Kilburn v. Adams, 7 Met. (Mass.) 33, 39 Am. Dec. 754; Cox v. Forrest, 60 Md. 74.

2. See authorities *supra*, note 1.

3. Ante, § 1056.

4. Ante, § 1056; Kilburn v. Adams, 7 Met. (Mass.) 33, 39 Am. Dec. 754; Cobb v. Davenport, 32 N. J. L. 369; Prince v. Wilbourn, 1 Rich. L. (S. C.) 58; Burnham v. McQuesten, 48 N. H. 446.

1. 2 Tiffany, Real Prop., § 450; Kilburn v. Adams, 7 Met. (Mass.) 33, 39 Am. Dec. 754; Parker v. Foote, 19 Wend. (N. Y.) 309; Ward v. Warren, 82 N. Y. 265; Weiseman v. Lucksinger, 84 N. Y. 31, 38 Am. Rep. 479; Demuth v. Amweg, 90 Penn. St. 181; Conyers v. Scott, (1145)

It is also essential, in order that the user may be adverse, that it be such as would give rise to a *right of action* or of *legal redress* on the part of the owner of the land, since otherwise he would have *no power* legally to break the continuity of the user, and would be deprived of his rights without the power to prevent it.²

Thus, the use of a *public highway* by an individual, though he use it for the prescriptive period, gives him no *private* right of way over the land, should the public way be abandoned or discontinued, for the owner could have brought *no action* against him to prevent his user, so long as the way is *public*. But should he continue the use after the highway is abandoned, he might then, after the lapse of the prescriptive period, acquire a right thereto.³

§ 1066. Same—Criterion of Hostile Uses.

The principles enunciated in the preceding section afford an excellent working criterion whereby to determine in most cases whether there may be a title by prescription at all in a given case, and, if so, when the prescriptive period begins to run.

Since one cannot in general be deprived of his enjoyment of his own property by a mere user of another, unless and until he has had an opportunity to prevent such user by legal process,¹

94 Ky. 123; *Lanier v. Booth*, 50 Miss. 410; *Conner v. Woodfill*, 126 Ind. 85, 22 Am. St. Rep. 568; *Reimer v. Stuber*, 20 Penn. St. 458, 59 Am. Dec. 744.

2. *Gilmore v. Driscoll*, 122 Mass. 199, 207; *Carlisle v. Cooper*, 19 N. J. Eq. 256; *Roundtree v. Brantley*, 34 Ala. 544, 73 Am. Dec. 470; *Emery v. Railroad Co.*, 102 N. C. 210, 11 Am. St. Rep. 727; *Mitchell v. Rome*, 49 Ga. 19, 15 Am. Rep. 669; *Turner v. Hart*, 71 Mich. 128, 15 Am. St. Rep. 243. But the fact that he could in his action recover only *nominal damages* is immaterial, since he may thereby none the less vindicate his rights. *Bolivar Mfg. Co. v. Neponset Mfg. Co.*, 16 Pick. (Mass.) 241; *Parker v. Foote*, 19 Wend. (N. Y.) 309; *Olney v. Fenner*, 2 R. I. 211, 57 Am. Dec. 711.

3. 2 *Tiffany*, Real Prop., § 450; *Webster v. Lowell*, 142 Mass. 324; *Wheeler v. Clark*, 58 N. Y. 267; *Whaley v. Stevens*, 27 S. C. 549; *Black v. O'Hara*, 54 Conn. 17.

1. Ante, § 1065, and cases cited in notes 2, 3.

(1146)

it follows that there can be no hostile or adverse user, such is essential to title by prescription, until there has accrued to the owner of the land a right by action or other legal process to prevent such user. Hence, the *accrual of the right of action* or other legal redress may be taken as the *starting point* of a title by prescription, and as the criterion by which to determine whether a particular easement or other incorporeal hereditament may be acquired by prescription at all.²

Thus, if a *lower* riparian owner, during the prescriptive period, appropriates an excessive quantity of water from a stream, this would not give him a prescriptive right thereto as against an upper proprietor, who would have no legal means of preventing it, except by appropriating the water himself.³ So, one cannot acquire a prescriptive right to water *percolating* from other land, nor to a *flow of surface water* from other land, since no right of action nor of legal process to prevent the use of it accrues to the owner of the land from which the water flows.⁴

So it is, also, in this country at least, with regard to the doctrine of *ancient lights*. One cannot, by receiving light into his windows over a vacant lot for twenty years (or the prescriptive period) acquire a prescriptive right to the continued use of such light, and prevent the owner of the lot from building thereon, for the first party's use of the light is not actionable nor remediable by any proceeding at law, but only by his placing some physical obstruction upon his own lot, which the law should not compel him to do if he does not wish it.⁵ And the same prin-

2. See cases cited *infra*.

3. 2 Tiffany, Real Prop., § 451; Sampson v. Hodinett, 1 C. B. (N. S.) 590; Stockport Waterworks Co. v. Potter, 3 Hurl. & C. 200; Thurber v. Martin, 2 Gray (Mass.) 394; Pratt v. Lawson, 2 Allen (Mass.) 275, 288; Parker v. Hotchkiss, 25 Conn. 321. See Leonard v. St. John, 101 Va. 752, 45 S. E. 474.

4. Ante, §§ 62, 128; Chasemore v. Richards, 7 H. L. Cas. 349; Broadbent v. Ramsbotham, 11 Exch. 602; Greatrex v. Hayward, 8 Exch. 291; Wheatley v. Baugh, 25 Penn. St. 528, 64 Am. Dec. 721; Roath v. Driscall, 20 Conn. 533, 52 Am. Dec. 352; Hanson v. McCue, 42 Cal. 503, 10 Am. Rep. 299; Frazier v. Brown, 12 Ohio St. 294.

5. Ante, § 127; Keats v. Hugo, 115 Mass. 204, 15 Am. Rep. 80; (1147)

ciple applies to prevent a prescriptive right from attaching in the case of support for a *building* by adjacent land or by another building.⁶

Applying the same criterion, a prescriptive right may be acquired as against a reversioner, though he has never been in possession of the land at any time during the adverse user, if he has during that period the right to institute legal proceedings to stop the adverse user.⁷

So, the fact that the user was commenced by permission or license of the owner rebuts the adverse character of the user, unless it be established that the permission or license was withdrawn by the owner or repudiated by the claimant before the prescriptive period commenced to run, in which case a right of action would have accrued to the owner.⁸

§ 1067. No Estate Less than One of Inheritance Can Be Acquired by Prescription.

A tenant for life, for years, or at will, cannot prescribe, by reason of the imbecility of his estate. For as prescription is usage beyond legal memory, it is absurd that such a tenant should pretend to prescribe for anything, when his estate commenced within the memory of man. These particular tenants, therefore, must prescribe by virtue of the previous enjoyment of the right, pleading that J. S. and his ancestors had imme-

Parker v. Foote, 19 Wend. (N. Y.) 309; *Haverstick v. Sipe*, 33 Penn. St. 368; *Powell v. Sims*, 5 W. Va. 1, 13 Am. Rep. 629; *Pierre v. Fernald*, 26 Me. 436, 46 Am. Dec. 573; *Mullen v. Stricker*, 19 Ohio St. 135, 2 Am. Rep. 379; *Napier v. Bulwinkle*, 5 Rich. L. (S. C.) 311.

6. 2 *Tiffany*, Real Prop., § 451; *Tunstall v. Christian*, 80 Va. 1, 56 Am. Rep. 581; *Richard v. Scott*, 7 Watts (Penn.) 460; *Mitchell v. Rome*, 49 Ga. 19, 15 Am. Rep. 669; *Sullivan v. Zeiner*, 98 Cal. 346. But see *Lasala v. Holbrook*, 4 Paige (N. Y.) 169, 25 Am. Dec. 524; *Quincy v. Jones*, 76 Ill. 231, 20 Am. Rep. 243.

7. *Cross v. Lewis*, 2 B. & Cr. 686; *Reimer v. Stuber*, 20 Penn. St. 458, 59 Am. Dec. 744. See *Ward v. Warren*, 82 N. Y. 265; *Pentland v. Keep*, 41 Wis. 490.

8. *Eckerson v. Crippen*, 110 N. Y. 585; *Pitzman v. Boyce*, 111 Mo. 387; *Thoenke v. Fiedler*, 91 Wis. 386.
(1148)

morally used to have the right in question (*e. g.*, a right of common), as appurtenant to the land, and that J. S. had leased the land to the particular tenant for the term, etc. And, indeed, even a tenant in fee simple, when he claims by prescription a right appurtenant to land, must allege in pleading his *seisin in fee*, and then aver that he *and all those whose estate he hath* in the land, from time whereof the memory of man is not to the contrary, had, and of right ought to have had, the privilege in question; which is termed from the phrase, “those *whose estate he hath*,” prescribing in a *que estate*.¹

§ 1068. Distinction in Pleading between Prescribing in a *Que Estate* and in Oneself and One's Ancestors.

When one prescribes in a *que estate* (that is, in himself, and those whose estate he has), nothing can be included in his claim but such things as are *appendant* or *appurtenant*, that is, incident to lands; for it would be absurd to claim anything as the consequence or appendix of an estate with which the thing claimed has no connection. But if he prescribed *in himself and his ancestors*, he may prescribe for anything whatsoever that lies in grant, not only things appurtenant to land, but also things *in gross*. Thus, he may prescribe in a *que estate*, for a right of *common appurtenant* to a certain tract of land, but for a *common in gross* he can prescribe only in himself *and his ancestors*.¹

1. 2 Min. Insts. 567; 2 Bl. Com. 264, 265; *Mellor v. Spateman*, 1 Saund. 346.

1. 2 Min. Insts. 568; 2 Bl. Com. 266; *Mellor v. Spateman*, 1 Saund. 346.

CHAPTER XII.

TITLE BY CONVEYANCE—I. ALIENATION IN GENERAL.

- § 1069. Outline of Discussion.
- 1070. Nature of Alienation in General.
- 1071. Subject Matter of Alienation.
- 1072. Same—Present Doctrine in Virginia.
- 1073. Incapacity to Aliene of Person Non Compos Mentis.
- 1074. Incapacity of Infants to Aliene.
- 1075. Same—Conveyance of Infants' Lands in Virginia by Statute.
- 1076. Incapacity of Person Intoxicated to Aliene.
- 1077. Incapacity of Person under Duress to Aliene.
- 1078. Incapacity of Married Woman to Aliene.
 - At Common Law.
- 1079. Use of Fines and Common Recoveries.
- 1080. Married Woman's Equitable Separate Estate.
- 1081. Married Woman's Conveyance in Virginia of Property Other than Her Statutory Separate Estate.
- 1082. Married Woman's Conveyance in Virginia of Her Statutory Separate Estate.
- 1083. Incapacity of Person Attainted of Treason or Felony to Convey.
- 1084. Incapacity of an Alien to Convey.
- 1085. Incapacity of a Corporation to Convey.
- 1086. Incapacity to Be an Alienee.
 - In General.
- 1087. Grantee Insufficiently Designated.
- 1088. Alienee Dead at Time of Transfer.
- 1089. Alien as Alienee.
- 1090. Corporation as Alienee.
 - In England.
- 1091. First Device to Evade Law of Mortmain.
- 1092. Second Device to Evade Statutes of Mortmain.
- 1093. Third Device to Evade Statutes of Mortmain.
- 1094. Fourth Device to Evade Statutes of Mortmain.
- 1095. Corporation as Alienee in Virginia.
- 1096. Person Attainted of Treason or Felony as Alienee.
- 1097. Fiduciary as Alienee.

§ 1069. Outline of Discussion.

The subject of title by conveyance is extensive and may be appropriately considered under the following main heads; (1)
(1150)

Alienation in general; (2) The deed accompanying the conveyance; and (3) The several species of conveyance. To each of these main heads a chapter will be devoted.

In examining the first of these main heads; namely, alienation in general, we shall consider (1) The nature of alienation; (2) The subject matter of alienation; (3) Incapacity *to aliene* of person *non compos mentis*; (4) Incapacity of infant; (5) Incapacity of person intoxicated; (6) Incapacity of person under duress; (7) Incapacity of married woman; (8) Incapacity of person attainted of treason or felony; (9) Incapacity of alien; (10) Incapacity of corporation; (11) Incapacity *to be alienee* in general; (12) Alienee insufficiently designated; (13) Dead alienee; (14) Alien as alienee; (15) Corporation as alienee; (16) Person attainted of treason or felony as alienee; (17) Fiduciary as alienee.

§ 1070. Nature of Alienation in General.

The most usual method of acquiring a title to real estate, as Blackstone remarks, is that by alienation, conveyance, or purchase in its limited and popular sense; under which may be comprised any method whereby estates are voluntarily resigned by one man, and accepted by another, whether that be effected by sale, gift, marriage settlement, devise, or other transmission of property by the mutual consent of the parties.¹

The general doctrine of the common law, as well in the United States as in England, is that the law of the place where the property is situated the *lex loci rei sitæ*, exclusively governs real property in respect to the rights of the parties, the modes of transfer, and the solemnities which should accompany them. The title, therefore, to real property can be acquired, passed, and lost only according to the *lex loci rei sitæ*.²

Alienation, as a means of acquiring real estate, is not of equal antiquity in the common law of England with that of taking it

1. 2 Min. Insts. 635; 2 Bl. Com. 287.

2. 2 Min. Insts. 635; Story, Confl. Laws, §§ 424, 428, 434, 464; Minor, Confl. Laws, § 11, et seq.

by descent; for although it is generally admitted that unlimited power of alienation existed prior to the Conquest, in the time of the Saxons, yet the introduction of the system of feuds, which followed close after the Conquest, wrought a total revolution in this particular.³

For we may remember that, by the feudal law, a pure and genuine feud could not be transferred from one feudatory to another without the consent of the lord; lest thereby a feeble tenant, or one liable to suspicion, might have been substituted and imposed upon him to perform the feudal services, instead of one on whose abilities and fidelity he could depend. Neither could the feudatory then subject the lands to his debts; for thus the feudal restraint of alienation would have been easily evaded. And as he could not aliene it in his lifetime, so neither could he by will defeat the succession, by devising the feud to another family; nor even alter the course of it, by imposing particular limitations, or prescribing an unusual path of descent. Nor, in short, could he aliene the estate, even with the consent of the lord, unless he had also obtained the consent of his next apparent or presumptive heir. And, therefore, it was very usual in ancient feoffments to express that the alienation was made by consent of the heirs of the feoffor, or sometimes for the heir apparent himself to join with the feoffor in the grant. And on the other hand, as the feudal obligation was looked upon as being reciprocal, the lord could not aliene or transfer his seignior, without the consent of his vassal; for it was esteemed unreasonable to subject a feudatory, without his own consent, to a new superior, with whom he might have a deadly enmity; or even to transfer his fealty, without his being thoroughly apprized of it, that he might know with certainty to whom his renders and services were due, and be able to distinguish a lawful distress for rent from a hostile seizing of his cattle by the lord of a neighboring clan. This consent of the vassal was expressed by what was called *attorning*, or professing to accept the new lord in the *tourn* or place of the old, which doctrine of attornment was afterwards extended to all lessees for life or

3. 2 Min. Insts. 64, 635; 2 Lom. Dig. 2.
(1152)

years. For if one bought an estate with any lease for life or years standing out thereon, and the lessee or tenant refused to *attorn* to the purchaser, and to become his tenant, the grant or contract was in most cases void, or at least incomplete; which was also an additional clog upon alienations.⁴

But by degrees this feudal severity is worn off; and experience has shown that property best answers the purposes of civil life, especially in commercial countries, where its transfer and circulation are perfectly free and unrestrained.⁵

§ 1071. Subject Matter of Alienation—Common Law Doctrine.

At common law, a grantor can convey no title to lands, unless it be fortified and sanctioned by the *possession*. The *naked right*, whether it be the right of possession or the right of property, is not capable of being conveyed, lest it should enable the great men of large social and political influence to obtain pretended titles, whereby justice might be trodden down, and the weak oppressed. But this principle does not hinder reversions and vested remainders from being granted, nor contingent remainders, where the owner is ascertained, because the possession of the particular tenant is the possession of him in remainder or reversion.¹

4. 2 Min. Insts. 635; 2 Bl. Com. 287, 288. Attornment by the tenant is now rendered unnecessary in Virginia by statute, and is declared to be *void*, if made to a stranger. Va. Code, 1904, §§ 2783, 2784.

5. 2 Min. Insts. 635; 2 Bl. Com. 288. See Va. Code, 1904, §§ 2783, 2784.

1. 2 Min. Insts. 640, 641; 2 Bl. Com. 290, n. (6). And by the English statute of "*pretensed titles*" (that is, pretended titles), 32 Hen. VIII, c. 9, no person was allowed to convey or take, or to bargain to convey or take, any *pretensed* title to lands or tenements, unless the grantor, or those under whom he claimed, shall have been in possession of the same, or of the reversion or remainder thereof, one year next before, under penalty of forfeiting the *whole value* of the lands, etc. 2 Min. Insts. 641; 4 Bl. Com. 125, 136. And this was the law of Virginia also until 1850. 2 Min. Insts. 641.

(1153)

§ 1072. Same—Present Doctrine in Virginia.

Since 1850, in Virginia, it has been enacted that *any interest in or claim to* real estate may be disposed of by deed or will; and that any estate may be made to commence *in futuro* by deed, in like manner as by will;¹ and the power of disposition by will extends to any estate, right, or interest, to which the testator may be entitled at his death, notwithstanding he may become so entitled subsequent to the execution of the will.²

§ 1073. Incapacity to Aliene of Person Non Compos Mentis.

According to Lord Coke, the phrase "*non compos mentis*" expresses any and every kind of mental aberration, and is, he says, the "most sure and legal" for that purpose; including (1) Idiots, who from their nativity are wanting in understanding; (2) Lunatics, who sometimes have understanding and sometimes not; (3) Persons *non-sane*, who by sickness, grief, or other accident have wholly lost their memory and understanding; and (4) Persons drunken, who by their own vicious act have for a time deprived themselves of their understanding and memory.¹

In modern times *non-sane* persons include idiots and lunatics, the latter word being commonly used to signify all who, by any event supervening *after birth*, are deprived of their understanding, whether with or without lucid intervals; whilst persons drunken are assigned to a separate class.²

A very remarkable doctrine is recognized by Littleton and Lord Coke as undoubted law,³ namely, that if a *non-sane* person executes a conveyance, *he* shall not plead his want of reason (although his *heir* may) to invalidate his conveyance, because "no man of full age shall be received in any plea by the law to disable his own person;" to which was sometimes added

1. Va. Code, 1904, § 2418.

2. Va. Code, 1904, § 2512; 2 Min. Insts. 641, 642.

1. 3 Th. Co. Lit. 45, 46; 2 Min. Insts. 642.

2. 2 Min. Insts. 643; post, § 1076.

3. 3 Th. Co. Lit. 44, et seq.

the further reason, that if he were really out of his senses, he could not know whether he had made the conveyance or not.⁴

To the credit of the law this doctrine has been, in later times, absolutely and wholly repudiated and abandoned; and it is admitted that in all cases the party himself, as well as his heir, may invalidate any conveyance, or other contract, made whilst in a state of mental aberration.⁵

In respect to the *amount* of mental weakness or disturbance which will invalidate a conveyance, or other contract, the rule is the same as in the case of wills. Mere weakness of understanding is no objection to a man's disposing of his own estate. Courts cannot measure people's capacities, nor examine into the wisdom and prudence of their property dispositions. If a man be legally *compos mentis*, be he wise or unwise, he is the disposer of his own property, and his will stands as a reason for his actions. The *test of legal capacity* is said to be that the party is capable of recollecting the property he is about to dispose of, the manner of distributing it, and the objects of his bounty. But of course the particular act must be attended with the *consent of his will and understanding*. For although the person may labor under no legal incapacity to do a valid act, or make a contract, yet if the circumstances of the whole transaction taken together, mental weakness being one of them, show that consent, the *very essence of the act*, was wanting, it is not valid.⁶

Much less derangement or weakness of mind is sufficient to make a deed *voidable* (as for fraud) than is necessary to render it *absolutely void* (for want of an agreeing mind), and in the first instance, if the grantee or a purchaser from him takes without notice of the intellectual defects of the grantor, he acquires

4. 2 Min. Insts. 643; 2 Bl. Com. 291, 292; *Beverley's Case*, 4 Co. 123b.

5. 2 Min. Insts. 643; 2 Kent, Com. 451; 2 Bl. Com. 292, n. (9); 1 Story, Eq. Jur., § 227.

6. 2 Min. Insts. 643; *Greer v. Greer*, 9 Gratt. (Va.) 332, 333; *Samuel v. Marshall*, 3 Leigh (Va.) 567; *Stearns v. Beckham*, 31 Gratt. 379; *Stevens v. Van Clieve*, 4 Wash. (U. S. C. C.) 262; *Stewart v. Lisenard*, 26 Wend. (N. Y.) 255. See *Beverley v. Walden*, 20 Gratt. 147; *Jackson v. Counts*, 106 Va. 7, 54 S. E. 870.

a good title, or at least he must be placed *in statu quo* as a condition of setting aside the conveyance. The circumstances of the case must be looked to.⁷

Derangement of mind must be proved by him who alleges it; but if general derangement be once established, and an act is alleged to have been done in a lucid interval, the burden of proof is on the party alleging such lucid interval, to show sanity and competence at the time of the act. And the evidence applying to such interval ought to go to the state and habit of the person, and not relate to a casual interview, as to the degree of self-possession in the particular act.⁸

The student will observe that the statutes of Virginia authorize the circuit and corporation courts in chancery to direct the sale of the estates of insane persons, at the instance of the committee of such insane person, whenever the court shall deem that the interest of the insane person will be thereby promoted.⁹

§ 1074. Incapacity of Infants to Aliene.

Whilst some contracts of an infant are *valid* and a few are *void*,¹ the great bulk of their business transactions are *voidable* at the election of the infant upon attaining his majority; and to this latter class belongs for the most part an infant's conveyance of his land;² that is, an infant's conveyance of land is ef-

7. *Jackson v. Counts*, 106 Va. 12, 54 S. E. 870; *Henderson v. Hunton*, 26 Gratt. (Va.) 926, 933; *Hazelwood v. Forrer*, 94 Va. 709, 27 S. E. 507.

8. 2 Min. Insts. 644; 1 Greenleaf, Ev., § 42; *Atty. Gen. v. Paruther*, 3 Bro. Ch. 441; *Fishburne v. Ferguson*, 84 Va. 87, 108, 4 S. E. 575.

9. Va. Code, 1904, § 1703, et seq.; 2 Min. Insts. 644. See *Faulkner v. Davis*, 18 Gratt. (Va.) 651, 98 Am. Dec. 698; *Queensberry v. Barbour*, 31 Gratt. 491; *Palmer v. Garland*, 81 Va. 444.

1. 1 Min. Insts. 510, et seq.

2. 2 Min. Insts. 644; 1 Min. Insts. 510, et seq.; 2 Lom. Dig. 11, et seq.; 2 Kent, Com. 235; *Zouch v. Parsons*, 3 Burr. 1805; *Wamsley v. Lindenberger*, 2 Rand. (Va.) 478; *Mustard v. Wohlford*, 15 Gratt. (Va.) 337, 76 Am. Dec. 209; *Tucker v. Morland*, 10 Pet. 71, 1 Am. Lead. Cas. 251; *Dolph v. Hand*, 156 Penn. St. 91, 36 Am. St. Rep. 25, note; *Jackson v. Carpenter*, 11 Johns. Ch. (N. Y.) 539; *Craig v.* (1156)

fectual to transfer the title thereto, unless it be *repudiated* by him after attaining his majority, which may be done even though the grantee has meanwhile conveyed to a *bona fide* purchaser without notice.³

At common law, since the conveyance, if of a *freehold*, must have been accompanied by livery of seisin, it could be repudiated by the infant only by an act of *equal solemnity*, that is, by *entry*.⁴ But in modern times, *any act* manifesting clearly an *intention to repudiate* the conveyance is regarded as sufficient.⁵ Thus, not only an entry,⁶ but also the institution of an *action of ejectment* by the infant to recover the land,⁷ or the institution by him of a suit to *cancel* the conveyance,⁸ or an *inconsistent conveyance* subsequently made by him to another person,⁹ all constitute sufficient evidence of the infant's intention to repudiate the conveyance, provided the acts of repudiation occur after

Van Bebber, 100 Mo. 584, 18 Am. St. Rep. 573, note. As to validity of a *marriage settlement* executed by an infant, in respect to personal and real estate, respectively, in England and in this country, see Smith v. Smith, 107 Va. 116, et seq., 57 S. E. 577.

3. 2 Tiffany, Real Prop., § 502. Mustard v. Wohlford, 15 Gratt. (Va.) 329, 340, 76 Am. Dec. 209; Irvine v. Irvine, 9 Wall. 617; Craig v. Van Bebber, 100 Mo. 584, 18 Am. St. Rep. 582, 661, note; Gillespie v. Bailey, 12 W. Va. 70, 29 Am. Rep. 445; Bool v. Mix, 17 Wend. (N. Y.) 119, 31 Am. Dec. 285; Slaughter v. Cunningham, 24 Ala. 260, 60 Am. Dec. 463; Harrod v. Myers, 21 Ark. 592, 76 Am. Dec. 409; Logan v. Gardner, 136 Penn. St. 588, 20 Am. St. Rep. 939.

4. 2 Tiffany, Real Prop., § 502; Bool v. Mix, 17 Wend. (N. Y.) 119, 31 Am. Dec. 285; Jackson v. Burchin, 14 Johns. (N. Y.) 124; Rogers v. Hurd, 4 Day (Conn.) 57. See Irvine v. Irvine, 9 Wall. 617.

5. 2 Tiffany, Real Prop., § 502.

6. Inhabitants of Worcester v. Eaton, 13 Mass. 371, 7 Am. Dec. 155; Green v. Green, 69 N. Y. 553, 25 Am. Rep. 233.

7. Birch v. Linton, 78 Va. 584, 49 Am. Rep. 381; Craig v. Van Bebber, 100 Mo. 584, 18 Am. St. Rep. 583, note.

8. Gillespie v. Bailey, 12 W. Va. 70, 89, 29 Am. Rep. 445; Watson v. Billings, 38 Ark. 278, 42 Am. Rep. 1.

9. Mustard v. Wohlford, 15 Gratt. (Va.) 329, 76 Am. Dec. 209; Tucker v. Morland, 10 Pet. 58, 71, et seq., 1 Am. Lead. Cas. 251; Peterson v. Laik, 24 Mo. 541, 69 Am. Dec. 441; Craig v. Van Bebber, 100 Mo. 584, 18 Am. St. Rep. 665, note.

(1157)

he becomes of age.¹⁰ And, on the other hand, if after he comes of age he *expressly confirms* the conveyance, or unequivocally recognizes it as valid, he is thenceforward precluded from repudiating it.¹¹ But, according to the better opinion, the fact that he merely fails to repudiate the conveyance within a reasonable time after he comes of age does not of itself operate as an affirmation of a conveyance made during his minority; for that purpose, such quiescence must continue for the period required for the running of the statute of Limitations.¹²

It will be remembered that the fact that the infant is a *married woman* at the time of the conveyance and executes the same under a statute permitting married women to convey upon conforming with certain requirements, does not deprive her of this right or privilege of repudiating the conveyance after coming of age, it being a settled rule of construction of such statutes that they are designed to obviate the one disability of *coverture*, and not the other and additional disability of *infancy*.¹³

10. *Zouch v. Parsons*, 3 Burr. 1794; *Tucker v. Morland*, 10 Pet. 75, 1 Am. Lead. Cas. 251; *Sims v. Everhardt*, 102 U. S. 300; *Craig v. Van Bebber*, 100 Mo. 584, 18 Am. St. Rep. 664, et seq., note; *Chandler v. Simmons*, 97 Mass. 508, 93 Am. Dec. 117; *Bool v. Mix*, 17 Wend. (N. Y.) 119, 31 Am. Dec. 285; *Harrod v. Myers*, 21 Ark. 592, 76 Am. Dec. 409. If the infant *die* without having either repudiated or affirmed the conveyance, his *heirs* (if the infant's estate be one of inheritance) or his *personal representative* (if the estate be less than inheritance) may repudiate it. 2 *Tiffany*, Real Prop., § 502; *Austin v. Trustees*, 8 Met. (Mass.) 196, 41 Am. Dec. 497; *Bozeman v. Browning*, 31 Ark. 364; *Gillenwaters v. Campbell*, 142 Ind. 529; *Singer Mfg. Co. v. Lamb*, 81 Mo. 221.

11. 2 *Tiffany*, Real Prop., § 502; *Keegan v. Cox*, 116 Mass. 289; *Lacy v. Pixler*, 120 Mo. 383; *Cox v. McGowan*, 116 N. C. 131; *Allen v. Poole*, 54 Miss. 323.

12. *Birch v. Linton*, 78 Va. 584, 49 Am. Rep. 381; *Wilson v. Branch*, 77 Va. 65, 46 Am. Rep. 709; *Sims v. Everhardt*, 102 U. S. 300; *Craig v. Van Bebber*, 100 Mo. 584, 18 Am. St. Rep. 675, note; *Eureka Co. v. Edwards*, 71 Ala. 248, 46 Am. Rep. 314; *McMurray v. McMurray*, 66 N. Y. 175; *Davis v. Dudley*, 70 Me. 236, 35 Am. Rep. 318; *Donovan v. Ward*, 100 Mich. 601; *Peterson v. Laik*, 24 Mo. 541, 69 Am. Dec. 441. But see cases cited in note to *Craig v. Van Bebber*, *supra*.

13. Ante, §§ 312, 316; 2 Min. Insts. 654; *Thomas v. Gammell*, 6 Leigh (1158)

§ 1075. Same—Conveyance of Infant's Lands in Virginia by Statute.

The common law disability of infants in the matter of aliening lands, while intended as a protection to his youthful inexperience, frequently operated as a hardship upon him, when for any good reason it became necessary or beneficial to his interest to convey, lease or mortgage his property, so that statutes have been enacted in Virginia, as in most of the states, authorizing the conveyance or exchange,¹ the lease,² or the incumbrance,³ of an infant's lands by a proceeding in equity instituted by the *guardian* of the infant, there being appointed in every case a *guardian ad litem* who, as well as the infant (if over fourteen years of age) shall answer the bill on oath in proper person.⁴ The procedure, being statutory, should be in substantial compliance with the statute in every particular, though being remedial the statutory requirements are to be construed liberally.⁵

§ 1076. Incapacity of Person Intoxicated.

The plea of drunkenness was formerly regarded with as little favor in civil as it still is in criminal cases. For although Lord Coke classes a drunkard as *non compos mentis*, yet he allows him no indulgence on that account. "As for a drunkard," says he, "who is *voluntarius dæmon*, he hath (as has been said) *no privilege thereby*, but what hurt or ill he doth, his drunkenness doth aggravate it."¹

But for more than a century this rigorous doctrine has been

(Va.) 9; *Walsh v. Young*, 110 Mass. 396; *Sandford v. McLean*, 3 Paige (N. Y.) 117, 23 Am. Dec. 773; *Greenwood v. Coleman*, 34 Ala. 150; *Watson v. Billings*, 38 Ark. 278, 42 Am. Rep. 1; *Epps v. Flamers*, 101 N. C. 158; *McMorris v. Webb*, 17 S. C. 558, 43 Am. Rep. 629.

1. Va. Code, 1904, § 2616, et seq.

2. Va. Code, 1904, §§ 2615, 2620, et seq.

3. Va. Code, 1904, § 2620, et seq.

4. Va. Code, 1904, §§ 2616, 2618.

5. *Faulkner v. Davis*, 18 Gratt. (Va.) 651, 98 Am. Dec. 698; *Vaughan v. Jones*, 23 Gratt. 456; *Garland v. Loving*, 1 Rand. 396.

1. 3 Th. Co. Lit. 46; 2 Min. Insts. 644, 645; *Beverley's Case*, 4 Co. 124b; 1 Plowd. Com. 19.

much relaxed, and it is agreed that drunkenness invalidates, or renders voidable all contracts and transactions where: (1) The drunkenness was brought about by the opposite party; (2) A fraudulent advantage was taken of it; (3) It deprived the party of his reason, and of an agreeing mind. Although in this last case, the inebriate may be made liable for *necessaries*, like a lunatic, upon a *promise implied*.²

The mere fact that one is drunk when he enters into a contract is no ground for setting it aside, at least in equity, unless under one of the other of the circumstances above stated,³ but when a person's habitual addiction to intoxication renders him extremely subject to imposition, such habits, though not carried to an excess constituting absolute incapacity, lay a ground for strict examination whether any instrument executed by him does not in itself, or in the attendant circumstances, contain evidence that advantage was taken of those habits.⁴

If the grantor's drunkenness has been *brought about* by the grantee, or if the latter has *taken advantage* of it (even though the grantor has not lost his reason because of the intoxication), these are such flagrant badges of fraud on the part of the grantee as to render the conveyance *voidable* both at law and in equity.⁵

But if the intoxication at the time of the conveyance is so complete as to *deprive the grantor of reason* and of an *agreeing mind*, it would seem upon principle, without reference to the question of fraud, that the conveyance should be wholly *void*,

2. 2 Min. Insts. 645; 2 Lom. Dig. 290, 291; 1 Chitty, Cont. 192; Smith, Cont. 202; 1 Parson, Cont. 311, n. (n); Story, Cont., § 86; Gore v. Gibson, 13 M. & W. 625, et seq.

3. 2 Min. Insts. 645; Johnson v. Medlicott, 3 P. Wms. 130; Cory v. Cory, 1 Ves. Sr. 19; Cooke v. Clayworth, 18 Ves. 15, et seq.; Rich v. Sydenham, 1 Ch. Cas. 202.

4. 2 Min. Insts. 645; Say v. Barwick, 1 Ves. & B. 199; Dunnage v. White, 1 Swanst. 150; Mountain v. Bennet, 1 Cox, 355; Samuel v. Marshall, 3 Leigh (Va.) 572.

5. 2 Min. Insts. 645; Johnson v. Medlicott, 3 P. Wms. 130, n. (A); Cory v. Cory, 1 Ves. Sr. 19; Cooke v. Clayworth, 18 Ves. 15, et seq.; Gregory v. Frayser, 3 Campb. 454; Brandon v. Old, 3 Carr. & P. 410; Reynolds v. Waller, 1 Wash. (Va.) 164, 194; Harvey v. Peck, 1 Munf. (Va.) 518.

not merely *voidable* as in the other cases, since there is (by supposition) an absolute want of understanding and agreeing mind, without which there can be *no contract*.⁶

§ 1077. Incapacity of Person under Duress.

In order to give validity to a contract, the law requires the *free assent* of the party to be charged. Indeed, without freedom of will and choice, it is absurd to talk of *consent* or of contract at all. An agreement or conveyance, therefore, extorted by violence or terror, is voidable by him who is subjected to such constraint. But although it is immaterial whether the constraint proceeds from the other contracting party, or from his agent, or some one acting by collusion with him, yet if no connection is shown to exist between the other contracting party and the perpetrator, the validity of the contract is not affected by any violence, nor, in general, by any *fraud* of which the latter, being such stranger, may have been guilty.¹

And so, on the other hand, the general rule is that the duress must be suffered by the party who enters into the contract; and that if a stranger, not under its influence, enter into an agreement, in order to obviate the duress which another undergoes, the agreement is good. But it seems that the duress to a wife or child would avoid a contract, given under its influence, by the husband or parent.²

6. 2 Min. Insts. 646; *Pitt v. Smith*, 3 Campb. 33; *Fenton v. Hollo-way*, 1 Stark, 126; *Brandon v. Old*, 3 Carr. & P. 440; *Gore v. Gibson*, 13 M. & W. 625; *Cooke v. Clayworth*, 18 Ves. 16; *Reynolds v. Waller*, 1 Wash. (Va.) 164; *Wigglesworth v. Steers*, 1 Hen. & M. (Va.) 70, 3 Am. Dec. 602; *Harvey v. Peck*, 1 Munf. (Va.) 518; *Arnold v. Hickman*, 6 Munf. 15; *Samuel v. Marshall*, 3 Leigh (Va.) 572; *Johns v. Fritchey*, 39 Md. 258; *Bates v. Ball*, 72 Ill. 108. But it must be admitted that a strong array of authority is in favor of the view that the conveyance in such case is *voidable* merely. See cases cited in note to *Wade v. Colvert*, 2 Mill (S. C.) 27, 12 Am. Dec. 653.

1. 2 Min. Insts. 646; 1 Chitty, Cont. 269; Bac. Abr. Duress, (B); *Griffith v. Reynolds*, 4 Gratt. (Va.) 46; *Talley v. Robinson*, 22 Gratt. 896.

2. 2 Min. Insts. 646; 1 Chitty, Cont. 269; Bac. Abr. Duress, (B).

(1161)

Duress may consist either of actual violence, or threat thereof,³ and may therefore consist in (1) duress of *imprisonment*, and (2) duress of *threats* (*per minas*).⁴

The actual violence which constitutes such duress resolves itself always into *illegal imprisonment*, which may be in the common prison, or elsewhere, provided only it is a restraint of the person, and is unlawful, or if lawful, undue and illegal force be used, or the party is made to endure unnecessary and unlawful privation, as want of food, etc., and in order to free himself from such unlawful restraint, or privation, is induced to make the contract, etc.⁵

Duress *per minas*, or by *threats*, on the other hand, is where the party enters into a contract, induced thereto by a *reasonable fear*, occasioned by threats of (1) loss of life; (2) loss of member, or mayhem; (3) grievous bodily hurt; or (4) imprisonment.⁶ But a menace of a mere *battery* or of a *trespass* on lands or goods is not duress, and consequently does not affect the validity of a contract induced thereby; for the law considers that such a threat is not sufficient to overcome a firm and prudent man, seeing that adequate redress may be obtained for such injuries. Whereas, for serious and actual personal violence, no damage can be an adequate compensation; and, therefore, even a man of ordinary firmness may be unable to withstand the threat and immediate danger of such personal mischief.⁷

It is laid down in the old books⁸ that a threat to burn one's dwelling is not duress, such as to avoid a bond, etc., made under its influence, because adequate amends may be recovered. But it may well be doubted whether, in modern times, that principle would prevail, burning a dwelling being not only an of-

3. 1 Bl. Com. 136, 137.

4. 2 Min. Insts. 646.

5. 2 Min. Insts. 646, 647; 1 Bl. Com. 136, 137; 1 Chitty, Cont. 269; Cadaval v. Collins, 4 Ad. & E. 858.

6. 2 Min. Insts. 647; 1 Chitty, Cont. 269; Bac. Abr. Duress (A).

7. 2 Min. Insts. 647; 1 Chitty, Cont. 269, 270; Bac. Abr. Duress; Atlee v. Backhouse, 3 M. & W. 642, 650; Astley v. Reynolds, 2 Stra. 917; Skeate v. Beale, 11 Ad. & E. 983.

8. Bac. Abr. Duress; 3 Th. Co. Lit. 69.

fence in some circumstances capital, but being incapable of adequate reparation in damages, and seriously endangering life.⁹

So a threat to prosecute for felony, a friend or near relation, does not constitute such duress as to avoid a note given in consequence of the threat and in order to avert the prosecution.¹⁰

§ 1078. Incapacity of Married Woman to Aliene—At Common Law.

Partly upon the theory that at law the wife is *one with her husband* and that *her identity is merged in his*, and partly upon the theory that in matters of business in which both are concerned a married woman seldom persistently maintains an opinion and will adverse to her husband, or, in other words, is under her husband's constraining influence,¹ the common law adopts the general rule that a married woman can make no contract nor conveyance, such acts being absolutely *void*—and this, even though the husband have deserted the wife, or though they live apart by consent, or though they be divorced *a mensa*, etc. (unless, under the Virginia statute,² there be a decree of *perpetual separation* superadded to the decree of divorce from board and bed).³

9. 2 Min. Insts. 647; 1 Chitty, Cont. 272.

10. 2 Min. Insts. 647; *Keckley v. Union Bank*, 79 Va. 465, 466.

1. 2 Min. Insts. 648; 2 Lom. Dig. 468; ante, § 308.

2. Va. Code, 1904, § 2264.

3. 2 Min. Insts. 651; Bac. Abr. Bar. & F. (M); 1 Th. Co. Lit. 133, 134; *Marshall v. Rutton*, 8 T. R. 545; *Nurse v. Craig*, 2 Bos. & P. (N. R.) 148; *Hyde v. Price*, 3 Ves. Jr. 433; *Lewis v. Lee*, 3 B. & Cr. 291; *Hookham v. Chambers*, 3 Br. & B. (7 E. C. L.) 92; *Bogget v. Frier*, 11 East. 303; *Kay v. Duchesse de Pienne*, 3 Campb. 123.

To this general doctrine, however, there are some marked exceptions. Thus, for her own protection and advantage, a married woman is allowed to act as a *feme sole*—

(1) Where her husband is *civilliter mortuus*.

At common law this happens when he is *attainted* of treason or felony, has *abjured* the realm, or is *banished* or *transported*. 2 Bl. Com. 121; 4 Do. 380; *Portland v. Prodgers*, 2 Vern. 104; *Newsome v. Bowyer*, 3 P. Wms. 38; *Lean v. Schutz*, 2 W. Bl. 1198; *Carrol v. Blencon*, 4 Esp. 27. It seems that in Virginia no *civil death* is possible. Branch (1163)

Hence, any device, which would make possible a conveyance by a married woman, must surmount or elude these two obstacles,—the merger of the wife's legal identity in the husband's and his constraining influence upon her. By an act of parliament it might have been done with entire facility; but an act of parliament was not easily obtained in the earlier stages of the law; and meanwhile the daily needs of society pressed strongly for the recognition of married women's alienations in some form.⁴

§ 1079. **Same—Use of Fines and Common Recoveries.**

As shown in the preceding section, an act of parliament not being practicable, the courts and lawyers were put to their invention. It was observed that no principle forbade a married woman to be *sued*, and so her *oneness* with her husband might be obviated by a collusive suit brought by the intended grantee against the *feme covert* and her husband, in which there might be, *by compromise*, or *by default*, a judgment rendered for the land. And as to the *husband's constraint*, it was easy to elude

v. Bowman, 2 Leigh (Va.) 170; *Platner v. Sherwood*, 6 Johns. Ch. (N. Y.) 118.

(2) Where the husband is an *alien enemy*. *Deerly v. Duchess of Mazarine*, 1 Salk. 116. But see *De Wahl v. Braune*, 1 H. & N. 181.

(3) Where the husband is an *alien* and has never been in this country. See *Kay v. Duchesse de Pienne*, 3 Campb. 123; *Marshall v. Rutton*, 8 T. R. 545; 1 Bl. Com. 443, n. (42).

The former doctrine, laid down in *Walford v. Duchesse de Pienne*, 1 Esp. 554, and *Franks v. Duchesse de Pienne*, 1 Esp. 558, that the wife may act as a *feme sole* whenever the husband is an *alien*, if he has gone abroad, is overruled. Cases *supra*; *Barden v. Keverberg*, 2 M. & W. 61, 64; 1 Chit. Cont. 252, 253 (11 Am. Ed.).

(4) Where, in *Virginia* there is a decree of perpetual separation superadded to a decree of divorce *a mensa, etc.*

Such a decree the statute declares shall operate upon the property *thereafter acquired*, and upon the personal rights and *legal capacities* of the parties as a decree of divorce from the bond of matrimony, except that neither party shall marry again during the life of the other. Va. Code, 1904, § 2264.

4. 2 Min. Insts. 652.
(1164)

that objection by an *examination of the wife*, before judgment was allowed to be entered, so as to satisfy the court that she understood the transaction, and freely assented to it. And thus, by the device of fines and common recoveries, but especially of fines, the desired end was achieved; nor was any parliamentary method introduced (notwithstanding the American precedents) until by 3 and 4 Wm. IV, c. 74, aided by 8 and 9 Vict., c. 106, and 19 and 20 Vict., c. 108, a married woman was enabled to convey, as with us, with far greater facility and cheapness, by deed, executed with the concurrence of her husband, and accompanied by a privy examination and acknowledgment before certain public functionaries.¹

§ 1080. Same—Married Woman's Equitable Separate Estate.

While the common law, as pointed out in the preceding sections, viewed with great strictness the married woman's incapacity, the *court of equity*, at quite an early period, undertook in some cases to give her much greater freedom in respect to her equitable separate estate. The principle established in equity was that in the cases proper for the application of the principle, the intention of the party who created the equitable estate in the wife should control, at least in large measure, the question whether the wife should be permitted to convey the property so given her, and the method by which such conveyance should be effected.

Property thus bestowed upon the wife is known as her *equitable separate estate*, and for its creation it is essential that the intention should be manifest to settle it upon the wife to her separate use free from the control of her husband.¹

The whole doctrine of the equitable separate estate is the creature of equity, and sets at naught all or most of the principles of the common law touching the marital relation, and also touching property generally. Thus, a wife

1. Ante, § 308; 2 Min. Insts. 653; 2 Bl. Com. 355; Williams, Real Prop. 226.

1. 1 Min. Insts. 345, et seq.; Jones v. Jones; 96 Va. 749, 32 S. E. 463.

may be enabled to dispose of her separate estate as freely, and with less solemnity, than a *feme sole*, to charge it merely by *implication*, as a *feme sole* cannot do, and may also be restrained from conveying or charging it at all, a restraint adverse to one of the most settled doctrines of the general law of property.²

In respect to the power of alienation of a wife's separate estate, a distinction is made between *real* and *personal* property.³

As to *personal* property, the *jus disponendi* is incident to it in the fullest manner. The wife may dispose of it absolutely at her pleasure, by deed or will, as if she were a *feme sole*; unless the instrument which creates the estate and vests it in her shall *impose restrictions*, and then these restrictions will constitute the law of the case.⁴

In respect to *real property*, her power of disposition is more circumscribed. If she is not *in terms* allowed, by the instrument which clothes her with the separate estate, to aliene it in some designated way, she can do so *only by will* duly executed,⁵ or by *deed* executed with the formalities prescribed for married women (which will be considered in the following section).⁶ And, it seems, though permitted to aliene otherwise

2. Ante, § 582; 2 Min. Insts. 648; 1 Min. Insts. 345, et seq., 351, 355, et seq.; 2 Bl. Com. 293, n. (12). See *Dezendorf v. Humphreys*, 95 Va. 473, 28 S. E. 880.

3. 2 Min. Insts. 648; 1 Bishop, Mar. & Div., §§ 860, 869, n. (1).

4. 2 Min. Insts. 648; 1 Th. Co. Lit. 132, n. (N); 2 Story, Eq. Jur., § 1393; *Grigby v. Cox*, 1 Ves. Sr. 518; *Peacock v. Monk*, 2 Ves. Sr. 191; *Feltiplace v. Gorges*, 1 Ves. Jr. 46, n. (a); *Wagstaff v. Smith*, 9 Ves. 520; *Essex v. Atkins*, 14 Ves. 547; *Major v. Lansley*, 2 Russ. & My. 355; *Gore v. Knight*, 2 Vern. 535; *West v. West*, 3 Rand. (Va.) 373, 376, 389, 392; *Vizonneau v. Pegram*, 2 Leigh (Va.) 183; *Charles v. Charles*, 8 Gratt. (Va.) 486, 56 Am. Dec. 155; *Nixon v. Rose*, 12 Gratt. 425; *Penn v. Whitehead*, 17 Gratt. 503, 94 Am. Dec. 478; *Burnett v. Hawpe*, 25 Gratt. 481; *Finch v. Marks*, 76 Va. 209; *Bain v. Buff*, 76 Va. 374; *Geiger v. Blackley*, 86 Va. 330, 10 S. E. 43.

5. Va. Code, 1904, §§ 2418, 2513; ante, §§ 309, 311; 2 Min. Insts. 649.

6. Va. Code, 1904, §§ 2502, 2503; ante, § 311; post, § 1081; 2 Min. Insts. 649; *Taylor v. Cussen*, 90 Va. 40, 17 S. E. 721.

than in pursuance of the statute, she is not thereby precluded from adopting the statutory mode.⁷

The rents and profits of her separate real estate constitute *personalty*, and may be disposed of accordingly, unless invested in lands.⁸

Where the wife has the power of disposition, she may bestow her separate property as well *on her husband* as on a stranger, and that not by giving it to a third person to give to him, but by conveyance directly to himself (unless where she conveys under the statute). But a court of equity will not give sanction or effect to a conveyance to the husband, without first subjecting the wife to a privy examination, and adopting such other precaution as shall seem needful to ascertain her freedom of action.⁹

As to the wife's power to *charge* her equitable separate estate, the English doctrine is that, although a married woman is incapable, in general, of charging her *person* during the coverture, with any engagement whatsoever, yet as she may dispose of her separate estate *in chattels*, as if she were *sole*; she may *charge* it also at her pleasure, unless restricted by the instrument creating the estate. And not only may she charge it directly and expressly, but also by *implication*. Thus, if a married woman promise to pay money, or to do a collateral thing, the promise, so far as her *person* is concerned, is merely *void*; but if she has separate *personal* estate, or indeed, *real estate* either, she is considered as *intending by the promise*, whether verbal or written, to charge the estate with it; for, it is argued, she must have intended *something* by her promise; and as she must

7. 2 Min. Insts. 649; *Lee v. Bank*, 9 Leigh (Va.) 209.

8. 2 Min. Insts. 649; 2 Bright, Husb. & Wife, 224, et seq.; *West v. West*, 3 Rand. (Va.) 373, et seq.; *Vizonneau v. Pegram*, 2 Leigh (Va.) 183; *Williamson v. Beckham*, 8 Leigh 20; *Whiting v. Rust*, 1 Gratt. (Va.) 483; *Hume v. Hord*, 5 Gratt. 374; *Southby v. Stonehouse*, 2 Ves. Sr. 610; *Hearle v. Greenbank*, 1 Ves. Sr. 301; *Hodsden v. Lloyd*, 2 Bro. Ch. 534; *Churchill v. Dibben*, 9 Sim. 447.

9. 2 Min. Insts. 649; 2 Story, Eq. Jur., §§ 1395, 1396; 2 Bright, Husb. & W. 257; *Grigby v. Cox*, 1 Ves. Sr. 518; *Essex v. Atkins*, 14 Ves. 542; *Tykes v. Smith*, 1 Ves. Jr. 189; *Muller v. Bayly*, 21 Gratt. (Va.) 521.

be taken to know that she could not charge her person by it, the promise must be construed (*ut res valeat*, etc.), as designed to pledge her separate estate, notwithstanding the difficulty of conceiving upon what principle she can charge her estate thus, *by implication*, when she is admitted not to be sufficiently a free agent to bind her person by *express words*.¹⁰

This doctrine is recognized also in Virginia, not only as to separate *personal* estate, but as to *real property*, with no other qualification than that if it shall appear from all the circumstances of the case that no charge was intended, none ensues.¹¹

§ 1081. Same—Married Woman's Conveyance in Virginia of Property Other than Her Statutory Separate Estate.

In common with most of the states of this Union, Virginia has long had a statute providing for married women's conveyances. The *oneness* of the wife with the husband is obviated by the *potency of the statute*, which suspends her incompetency in those cases to which the statute applies. The husband's supposed coercion was formerly done away with by the *privy examination* of the wife before certain functionaries, but since 1887 the privy examination has been dispensed with entirely,¹ and since 1892, a curative act has existed in Virginia, the effect of which is to cure defects in married women's conveyances arising from a failure to observe the former requirements of the statute touching such privy examination, provided the purchase-money has been paid by the purchaser, and the grantee has remained in quiet and undisturbed possession under the

10. 2 Min. Insts. 650; 2 Bright, *Husb. & W.* 252, et seq.; *Hulme v. Tenant*, 1 Bro. Ch. 16, 1 White & Tud. Lead. Cas. Eq. 361, et seq.; *Murray v. Barlee*, 3 My. & K. 223; *Owens v. Dickinson*, 1 Cr. & Phil. 53, 54, n. (13).

11. 2 Min. Insts. 650; *Woodson v. Perkins*, 5 Gratt. (Va.) 351, 352; *Penn v. Whitehead*, 17 Gratt. 503, 512, 516, 94 Am. Dec. 478; *Leake v. Benson*, 29 Gratt. 157; *Burnett v. Hawpe*, 25 Gratt. 481; *Darnall v. Smith*, 26 Gratt. 884, et seq.; *McDonald v. Hurst*, 86 Va. 885, 11 S. E. 536.

1. Va. Code, 1904, § 2502; 2 Min. Insts. 653. See ante, § 311, et seq. (1168)

conveyance for *ten years* after the date of the recordation of the instrument.²

The allowance of such a conveyance is *an exception* to the general principles of the common law, and must, for that reason, be *construed strictly*. A *literal* compliance with the prescribed forms is not, indeed, required, but *any substantial departure* therefrom, in whatever particular, will wholly invalidate the instrument.³

These requirements have been much simplified since the abolition of the privy examination of the wife, consisting now of the following only:

1. Both *husband and wife* must be parties to the instrument, that is, they must both appear in the deed as *grantors* (or *vendors*, in the case of contracts to convey);⁴

2. Both *husband and wife* must sign the instrument;⁵

3. The instrument must be duly *acknowledged* and *admitted to record* as to the husband as well as the wife.⁶ Hence, if the deed be *lost or destroyed* before it is admitted to record, it does not operate to pass any interest of the wife.⁷

4. *No other disability* is obviated by the statute save that of *coverture*, since it is expressly declared that when duly executed

2. Va. Code, 1904, § 2298a; 1 Va. Law Reg. 292. See ante, § 312, note 7.

3. Ante, §§ 311, 312; 2 Min. Insts. 653; *Currie v. Page*, 2 Leigh (Va.) 620; *Tod v. Baylor*, 4 Leigh, 513; *Countz v. Geiger*, 1 Call (Va.) 190; *Harvey v. Peck*, 1 Munf. (Va.) 518.

4. Va. Code, 1904, § 2502; ante, § 311, et seq.; 2 Min. Insts. 654; *Sexton v. Pickering*, 3 Rand. (Va.) 468; *Green v. Claiborne*, 83 Va. 386, 5 S. E. 376; *Taylor v. Cussen*, 90 Va. 40, 17 S. E. 721.

5. Va. Code, 1904, § 2502; ante, § 312; 2 Min. Insts. 654; *Tod v. Baylor*, 4 Leigh (Va.) 498; *Siter v. McClanachan*, 2 Gratt. (Va.) 280.

6. Va. Code, 1904, § 2502; ante, § 312; 2 Min. Insts. 654, 655. Whether, as *between the parties*, if the land lies partly in one county and partly in another, the deed must be recorded in both counties, *quaere!* It has been decided that under the act of 1870, requiring the married woman's deed to be recorded "by the proper clerk" it need only be recorded in one of the counties. *Tarrant v. Core*, 106 Va. 165, 56 S. E. 228.

7. *Building, L. & W. Co. v. Fray*, 96 Va. 559, 32 S. E. 58.

and recorded, the instrument shall operate to convey the wife's interest "as effectively as if she were an unmarried woman." But an unmarried woman, if insane or an infant, cannot make a valid conveyance, and the fact that the infant or insane person is a married woman is immaterial.⁸

5. Lastly, it is to be observed that the statute applies not only to the *conveyance* of a married woman's property (or her dower right in her husband's property) but also to her *contracts* to convey and her *powers of attorney*.⁹

§ 1082. Same—Married Woman's Conveyance in Virginia of Her Statutory Separate Estate.

Except as to the wife's *equitable separate estate*, which remains unaffected by the statute about to be mentioned,¹ the disability of coverture, as to the transfer of the wife's property has been removed altogether in Virginia by the statute making *all* the wife's property her separate estate and providing that she shall by her *sole act* have complete control and power of disposition thereof (except that the husband is not to be deprived of his *curtesy* by her *sole act*).²

8. Ante, §§ 312, 1074; 2 Min. Insts. 654; *Thomas v. Gammel*, 6 Leigh (Va.) 9.

9. Ante, § 317; Va. Code, 1904, § 2502; 2 Min. Insts. 654, 655. For the terms of this statute, see ante, §§ 309, 311.

1. Va. Code, 1904, § 2294. Whether the separate estate of a married woman is *equitable* or *statutory* is to be ascertained from the terms of the instrument creating the settlement. If the instrument grants powers or imposes restrictions not granted or imposed by statute, but which are yet consistent with the principles and rules of *equity*, the estate is regarded as an equitable, and not as a statutory, separate estate. *Jones v. Jones*, 96 Va. 749, 32 S. E. 463.

2. Va. Code, 1904, § 2286a. The statute itself is as follows: "A married woman shall have the right to acquire, hold, use, control and dispose of property as if she were unmarried, and such power of use, control and disposition shall apply to *all* property of a married woman *heretofore or hereafter acquired*; provided, however, that her husband shall be entitled to curtesy in her real estate, when the common law requisites therefor exist, and he shall not be deprived thereof by her sole act; but the right to curtesy shall not entitle him to the (1170)

It will be observed that a married woman's conveyance under this statute, unlike that, described in the preceding section relating to her *equitable* separate estate, is not *void* if the husband be not united in the conveyance. On the contrary, it is a valid deed, passing all the *wife's* interest, the effect of the husband's non-joinder being merely that *his curtesy* is not barred thereby. Nor does the failure to admit the deed to record invalidate the conveyance *as between the parties* in this case, as it does in the other. In brief, the wife's deed is placed upon the same footing as the deeds of other persons, with the same requirements and no more.³

§ 1083. Incapacity of Person Attainted of Treason or Felony to Convey.

At common law, persons attainted of treason or felony are incompetent to convey from the time of the offence committed, because from that time the lands are liable to be forfeited to the crown.¹

In Virginia, as no such forfeiture ensues, no such disability exists.² But provision is made for the administration of the property of a convict, sentenced to the penitentiary for more than one year, by a committee appointed, upon the motion of

possession or use, or to the rents, issues and profits of said real estate *during the coverture*; nor shall the property of the wife be subject to the debts or liabilities of the husband. A married woman may contract and be contracted with, sue and be sued, in the same manner and with the same consequences as if she were unmarried, whether the right or liability asserted by or against her shall have accrued before or after the passage of this act. A husband shall not be responsible for any contract, liability or tort of his wife, whether the contract or liability was incurred or the tort was committed before or after marriage." Va. Code, 1904, § 2286a. It is also enacted that "The contingent right of dower of a married woman in real estate in which *her husband has no interest* shall be her separate estate, and she may dispose of the same by her sole act as if she were unmarried." Va. Code, 1904, § 2288b; ante, § 310. See 6 Va. Law Reg. 485.

3. Ante, § 309.

1. 2 Min. Insts. 655, 589; 2 Bl. Com. 290.

2. Va. Code, 1904, § 3883; 2 Min. Insts. 655, 589.

any party interested, by the court of the county or corporation in which the estate or some part thereof is;³ and for the sale of his real estate by such committee, when necessary for the payment of his debts, in the same manner as the real estate of an insane person in the hands of a committee.⁴

§ 1084. Incapacity of an Alien to Convey.

At common law aliens may take lands by *purchase*, or act of the party, but not by *descent*, which is an act of the law; nor can they, although they may *take* by purchase, *hold* even in that case. Hence, as lands in the possession of an alien are always liable to be forfeited, he can at common law make no good title thereto.¹

In Virginia, "any alien, *not an enemy*, may acquire by purchase or descent, and hold real estate in this State; and the same shall be transmitted in the same manner as real estate held by citizens." An alien *enemy* is subject to all the common law disabilities.²

§ 1085. Incapacity of a Corporation to Convey.

In England, corporations acquiring lands without license from the crown, contrary to the statutes of *mortmain*, are, by those statutes, liable to forfeit the same, and therefore can convey no perfect title thereto.¹

But in Virginia, and indeed generally in this country, even where the law expressly prohibits a corporation from "*acquiring*" more than a certain amount of real estate, if notwithstanding it does acquire more, and then transfers the same, such transfer is *valid* and passes a good title to the purchaser, upon the theory that if the corporation has violated the law, it is for the *State* to complain thereof through a writ of *quo warranto* or other proceeding for the *revocation of the charter*, or pos-

3. Va. Code, 1904, § 4115.

4. Va. Code, 1904, §§ 4121, 1703, et seq.

1. 2 Min. Insts. 655, 656; 2 Bl. Com. 293.

2. Va. Code, 1904, § 43; 2 Min. Insts. 656.

1. 2 Min. Insts. 589, et seq., 656; 2 Bl. Com. 268.

sibly for the *escheat* of the land (as being without a lawful owner), but private persons cannot take advantage of the corporation's violation of law.²

§ 1986. Incapacity to Be Alienee—In General.

Lands may in general be aliened to any person whomsoever, the exceptions being fewer than in the case of persons aliening; because every conveyance is supposed to be for the benefit of the grantee.¹

Thus, persons wanting in understanding or in freedom of will may take as alienees; and as it is usually for the *alienee's benefit*, the conveyance will be commonly good until the party, being restored to competency, shall plainly declare his intention to waive it. Thus, an infant or non-sane person may be a grantee, with the privilege, upon the removal of his disability, to agree to or avoid it, without any cause shown; a privilege which descends also to his heir, if he dies before the removal of the disability, or before agreeing to the transaction. And so, when a married woman is grantee, the conveyance is *not void*, as it is where she is grantor, but continues good during coverture, unless avoided by the husband's dissent; and, after the coverture ended, may be avoided or confirmed by her or her heirs.²

§ 1087. Same—Grantee Insufficiently Designated.

Persons insufficiently designated, so that it is not reasonably certain who is intended, can take nothing by any sort of con-

2. *Fayette Land Co. v. Louisville & N. R. Co.*, 93 Va. 274, 24 S. E. 1016; *Banks v. Poiteaux*, 3 Rand. (Va.) 141, 142; *Litchfield v. Preston*, 98 Va. 530, 37 S. E. 6; *Chesapeake & O. R. Co. v. Walker*, 100 Va. 69, 40 S. E. 633, 914; *Cowell v. Colorado Springs Co.*, 100 U. S. 55; *Jones v. Habersham*, 107 U. S. 174; *Mallett v. Simpson*, 94 N. C. 37, 55 Am. Rep. 594. But see 2 Min. Insts. 596.

1. 2 Min. Insts. 656; 2 Bl. Com. 292; 2 Th. Co. Lit. 214; *Sheppard's Touchst.* 235.

2. 2 Min. Insts. 656; 2 Bl. Com. 292; 2 Lom. Dig. 24, 377, 378; 2 Th. Co. Lit. 214, 215; *Sheppard's Touchst.* 235. Even an infant *en ventre sa mere*, if sufficiently described, may take as a grantee in a deed. See *Morris v. Candle*, 178 Ill. 9, 44 L. R. A. 489, note.

veyance. So if the *beneficial object* for which the conveyance is designed be undefined, the conveyance is void. Hence, a conveyance to an *unincorporated association* (as a religious congregation, etc.), or to the unborn bastard child of such a *man*, or for an object of general philanthropy (as the establishment of a place of education, or the benefit of the trade of a town), is, independently of statute, inoperative and void.¹

Literary charities, however, for *educational purposes* are, with some qualifications, made valid in Virginia by statute, and so, to a very limited extent, are conveyances (but not devises), for the benefit of religious and benevolent associations.²

Similar provisions are made in favor of benevolent associations, such as any society of freemasons, oddfellows, sons of temperance, or any other benevolent or literary association.³

Provision is also made for any of the foregoing associations suing or being sued through their trustees, and for the sale or mortgage of their property under the direction of a court of chancery.⁴

The certainty or uncertainty of the *trustee* is wholly immaterial, for however vaguely or obscurely he may be designated, or although none be designated, yet equity will supply a trustee in pursuance of its maxim, "never to suffer a trust to fail for want of a trustee."⁵

1. Ante, § 521, et seq.; 2 Min. Insts. 657.

2. Ante, §§ 521, 522; 2 Min. Insts. 657; 3 Lom. Dig. 181, et seq., 189, et seq.; Va. Code, 1904, §§ 1420, et seq., 1398, et seq.; *Vidal v. Girard*, 2 How. 127; *Wheeler v. Smith*, 9 How. 55; *Baptist Assoc. v. Hart*, 4 Wheat. 372; *Gallego v. Atto. Gen.*, 3 Leigh (Va.) 450; *Literary Fund v. Dawson*, 10 Leigh, 148; *Maund v. McPhail*, 10 Leigh, 199; *Kelly v. Love*, 20 Gratt. (Va.) 124; *Kinnaird v. Miller*, 25 Gratt. 119, et seq.; *Roy v. Rowzie*, 25 Gratt. 599; *Fifield v. Van Wyck*, 94 Va. 567, et seq., 64 Am. St. Rep. 745, 27 S. E. 446. See *Jordan v. Universalist Trustees*, 107 Va. 79, 57 S. E. 652.

3. Va. Code, 1904, § 1407; 2 Min. Insts. 658.

4. Va. Code, 1904, §§ 1402, 1405, et seq.; 2 Min. Insts. 658.

5. 2 Min. Insts. 658; 2 Story, Eq. Jur., §§ 976, 1059; 2 Pomeroy, Eq. Jur., § 1007, n. (2); *Charles v. Hunnicutt*, 5 Call (Va.) 312; *Adams v. Adams*, 21 Wall. 102.

(1174)

§ 1088. Same—Alienee Dead at Time of Transfer.

A deed to a grantee who is dead at the time the deed is executed is *void* at common law for want of a grantee, and the fact that the deed is to the dead man "*and his heirs*" does not carry title to his heirs, because those words were not intended to be words of *purchase*, but merely words of *limitation*, describing the estate of the grantee, it being intended that the *heirs* should take, if at all, by *descent* only from the grantee, and not as *purchasers* under the deed.¹

Independently of statute, the same rule applies to a devise, so that if a devisee is dead at the time the testator executes the will, or indeed if he dies at any time before the death of the testator himself, the devise is *void*, or, in technical language, *lapses*, and the heirs of the dead devisee are not entitled to the property thus devised, even though expressly mentioned.²

As to *wills*, however, this common law doctrine has in large measure been altered in Virginia by statute, it being enacted that "If a devisee or legatee die before the testator, *leaving issue who survive the testator*, such *issue* shall take the estate devised or bequeathed, as the devisee or legatee would have done if he had survived the testator, unless a different disposition thereof be made or required by the will."³ This statute applies only where the devisee or legatee die *leaving issue*, that is, children, grandchildren, greatgrandchildren, etc., and does not apply where he leaves merely *collateral* relatives to succeed him;⁴ but it applies equally whether the devisee or legatee is dead at the time of the *testator's death only* and where he is dead at the time *the will is executed*.⁵

1. 1 Devlin, Deeds, § 187; *Lewis v. McGee*, 1 A. K. Marsh. (Ky.) 199; *Hunter v. Watson*, 12 Cal. 363, 376, 73 Am. Dec. 543. See, also, *McInerney v. Beck*, 10 Wash. 515; *Simmons v. Spratt*, 22 Fla. 370. It would probably be otherwise, if the deed were to the dead grantee "*or his heirs*."

2. Post, § 1278, et seq.

3. Va. Code, 1904, § 2523.

4. Post, § 1279; *Wood v. Sampson*, 25 Gratt. (Va.) 845.

5. *Wildberger v. Cheek*, 94 Va. 517, 27 S. E. 441.

§ 1089. Alien as Alienee.

The common law, under no circumstances, permitted aliens to *hold* lands, save that persons engaged in trade might hire habitations and houses of business; and any alien who presumed to acquire any permanent estate in real property, whether in fee simple, for life, or for years, was liable to have the same immediately escheated to the crown.¹ This rigor, however, is with us confined to *alien enemies*, it being enacted that “an alien, *not an enemy*, may acquire by purchase or *descent*, and may *hold* real estate in this State; and the same shall be transmitted in the same manner as real estate held by citizens.”²

§ 1090. Corporation as Alienee—In England.

Alienation *in mortmain* (*in mortua manu*), is an alienation of lands or tenements to any *corporation*, sole or aggregate, ecclesiastical or temporal. But these purchases having been in early times made chiefly by *religious houses* (*e. g.* monasteries, etc.), in consequence whereof the lands became perpetually inherent in one *dead hand* (monks being esteemed *civilly dead*), this has occasioned the general appellation of *mortmain* to be applied to alienations to all corporations, and the religious houses themselves to be principally considered in forming the statutes of *mortmain*. And it will be curious, in deducing the history of these statutes, to observe the great address and subtle contrivance of the ecclesiastics in eluding from time to time the laws in being, and the pertinacity with which successive parliaments pursued them through all their artifices; how new remedies still begot new evasions, till the legislature at last, though not without repeated failures, obtained a decisive victory.¹

By the common law, after the feudal restraints upon alienation were worn away, any man might dispose of his lands to any other *private* person at his own discretion, and a corpora-

1. Ante, § 1084; 2 Min. Insts. 658; 1 Min. Insts. 164, et seq. See *Elmondorff v. Carmichael*, 3 Litt. (Ky.) 472, 14 Am. Dec. 97, note.

2. Va. Code, 1904, § 43; 2 Min. Insts. 658.

1. 2 Min. Insts. 590; 2 Bl. Com. 268.

tion is as capable of purchasing as an individual.²

But in consequence of feudal policy, in part, but also from high considerations of general expediency, it was always, and in England still is, necessary for *corporations* to have license in *mortmain* from the crown, to enable them, not indeed to *purchase*, but to *hold* lands; for as the king is the ultimate lord of every fee, he ought not, unless by his own consent, to lose his privilege of escheats, and other feudal profits by the vesting of lands in tenants that can never be attainted, or die. And indeed such licenses in mortmain seem to have been necessary before the Norman conquest. But besides this general license from the king, as lord paramount of the kingdom, it was also requisite, whenever there was an intermediate lord between the king and the alienor, to obtain his license also (upon the same feudal principles), for the alienation of the specific land. And if no such license was obtained, the king or other lord might respectively enter on the land so aliened in mortmain as a forfeiture. Yet such were the influence and ingenuity of the clergy, that (notwithstanding this fundamental principle) the most considerable dotations to religious houses happened within less than two centuries after the Conquest.³

§ 1091. Same—First Device to Evade Law of Mortmain.

The first device in order to evade the necessity for a license seems to have been this: The tenant who meant to alienate first *conveyed* his lands to the religious house, and *instantly* took them back again to hold as *tenant to the monastery*; which kind of instantaneous seisin was probably held not to occasion any forfeiture; and then, by pretext of some other forfeiture, or escheat accruing in consequence of the feudal relation, the society entered into these lands in right of such their newly acquired seignior, as immediate lords of the fee. But when these dotations began to grow numerous, it was observed that the feudal services ordained for the defence of the kingdom were

2. 2 Min. Insts. 590, 591; 1 Th. Co. Lit. 188, et seq.; Case of Sutton's Hospital, 10 Co. 306.

3. 2 Min. Insts. 591; 2 Bl. Com. 268, 269; 1 Stephens, Com. 422.

every day visibly withdrawn; that the lords were curtailed of the fruits of their seigniories, their escheats, wardships, reliefs, etc.; and that the circulation of landed property from man to man (a vastly important element of prosperity in every state), began to stagnate; and, therefore, in order to arrest those mischiefs, it was ordered by the second of Henry III's great charters, and afterwards by that printed in the statute-book (9 Hen. III, c. 36, A. D. 1225), which, by the way, is the earliest English statute now extant that none should "give his lands to any *Religious House*" and that all such contrivances should be void, and the land be *forfeited to the lord of the fee*.¹

§ 1092. Same—Second Device to Evade Statutes of Mortmain.

As the prohibition contained in *Magna Charta* extended only to religious *houses*, bishops, and other *sole corporations*, were not included therein; and the *aggregate* ecclesiastical bodies also found means to creep out of this statute, by buying in lands that were *bona fide* holden of themselves, as lords of the fee, and thereby evading the forfeiture; or by taking *long leases for years*. This was the *second device* adopted in order to evade the necessity for a license. It was speedily met by the statute *de religiosis* (7 Edw. I St. 2, A. D. 1279); which provided that *no person*, religious or other whatsoever, should buy or sell, or receive under pretence of a gift or term of years, or any other title whatsoever, nor should by any art or ingenuity appropriate to himself any lands or tenements in mortmain; upon pain that the immediate lord of the fee, or on his default for one year, the lords paramount, and in default of them, the king, might enter thereon as for a forfeiture.¹

§ 1093. Same—Third Device to Evade Statutes of Mortmain.

Notwithstanding the solicitude with which this statute seems

1. 2 Min. Insts. 591, 592; 2 Reeves, Hist. Eng. Law, 84, 85; 2 Bl. Com. 269, 270; 1 Stephens, Com. 422, 423, n. (g); 1 Stats. at Large, 9 Hen. III, c. 36.

1. 2 Min. Insts. 592; 2 Bl. Com. 270; 1 Stephens, Com. 423; 2 Reeves, Hist. Eng. Law, 154.

to have been penned, a method of evasion (their *third device*) was soon discovered by the ecclesiastics. This was to recover lands by default, in a *collusive suit* brought by the religious house against the person who had in contemplation to bestow lands in mortmain; for although this proceeding, being by consent, was in fraud of the policy of the law, yet, as the statute 7 Edw. I, extended only to *gifts and conveyances* between the parties, the justices held that the religious and ecclesiastical persons did not appropriate such lands *per titulum doni vel alterius alienationis*, as it was expressed in the statute, and that they were not within the words *aut alio quovismodo arte vel ingenio*; because the recoveries being prosecuted in a course of law, they were presumed to be just and lawful, and therefore it was determined that they were not within the statute. And thus the ecclesiastics had the honor of inventing those fictitious adjudications of right, which constituted for several centuries the great assurance of the kingdom, under the name of *common recoveries*. But upon this, parliament intervened again, and by statute West. II, 13 Edw. I, c. 32 (A. D. 1285), enacted that in such cases a jury shall try the *true right* of the demandants or plaintiffs to the land, and if the religious house or corporation be found to have it, they shall still recover seisin, otherwise it shall be forfeited to the immediate lord of the fee, or else to the next lord, and finally to the king, upon the default of the immediate or other lord; and when in the eighteenth year of the same sovereign, the statute *Quia Emptores* was passed, allowing all men to alienate their lands, a proviso was inserted that this should not extend to authorize any kind of alienation in mortmain.¹

§ 1094. Same—Fourth Device to Evade the Statutes of Mortmain.

The fourth device was more ingenious and more far-reaching in its consequences than any of the preceding. For almost a hundred years after 13 Edw. I, c. 32 (A. D. 1285), the clergy were constrained to content themselves with such acquisitions

1. 2 Min. Insts. 592, 593; 2 Bl. Com. 271.

of lands as they could obtain a license for from the crown. In the latter part of the reign of Edward III, however (say about A. D. 1370), they fell upon a new method of conveyance, by which the lands were granted, not to themselves directly, but to nominal feoffees (whom in modern times we should style trustees) *to the use* of the religious houses; thus distinguishing between the *possession* and the *use*, and themselves receiving the actual profits, while the *seisin* of the land remained in the nominal feoffee; who was held by the courts of equity, after some fluctuations, to be bound in conscience to account to his *cestui que use* (so the beneficiary was called), for the rents and profits of the estate. And it is to this invention, the idea of which was derived from the *fidei commissa* of the Roman law, that the Anglican world is indebted for the introduction of uses and trusts, the nature of which we have already seen,¹ and which enter so largely into modern property arrangements. But unfortunately for the inventors themselves, they did not long enjoy the advantage of their new device, for the statute 15 Rich. II, c. 5 (A. D. 1392,) enacts that the lands which had been so purchased to uses should be *amortised* (that is, conveyed in mortmain), by license from the crown, or else be aliened to some other use; and that all future purchases in that way were to be considered as within the statutes of mortmain. And civil or lay, as well as ecclesiastical corporations, are also declared to be within the mischief, and of course within the remedy, provided by those laws.²

The clergy, finding that the legislature was as persistent in annulling and obviating their contrivances as they had been fruitful and ingenious in devising them, now gave up the contest, and no more attempted to thwart the settled policy of the realm.³

§ 1095. Same—Corporation as Alienee in Virginia.

In Virginia, corporations have power, where it is not other-

1. Ante, § 447, et seq.; 2 Min. Insts. 204, et seq.

2. 2 Min. Insts. 593, 594; 2 Bl. Com. 271, 272; 1 Stephens, Com. 425; 3 Reeves, Hist. Eng. Law, 178, 179.

3. 2 Min. Insts. 594.

wise provided, to purchase, hold and grant such estates, real and personal, as are *proper for the purposes* for which they are incorporated.¹

These provisions are certainly to be liberally construed. Whether the lands purchased by a corporation be "proper for the purpose for which it was incorporated," does not, in its nature, admit of every accurate determination. Thus, where a bank having, by its charter, power to hold such lands only as "shall be requisite for its immediate accommodation," bought a lot of dimensions sufficient, not only for its banking house, but also for a fire-proof building on each side, for the greater security of the banking house, it was held that the charter was not thereby violated.²

According to the prevailing opinion, if a corporation purchase land in excess of its needs, the title is notwithstanding good in the corporation, even as to the excess, except perhaps at the instance of the *State* itself, in a proceeding instituted directly for the purpose of depriving the corporation of the property, as by *escheat*; and even this is very doubtful. Indeed, the better opinion seems to be that while the State may for such cause institute a proceeding in the nature of a *quo warranto*, or an equivalent procedure, to forfeit the *charter* of the corporation, the title to the land itself remains in the corporation or its alienees; and upon the dissolution of the corporation, its property does not go to the State by way of escheat for lack of owners, but after payment of debts is to be divided among the stockholders in proportion to the shares they hold.³

§ 1096. Persons Attainted of Treason or Felony as Alienees.

A person attainted of treason or felony may, at common law,

1. 2 Min. Insts. 596; Va. Code, 1904, § 1105e; Chesapeake & O. R. Co. v. Walker, 100 Va. 69, 40 S. E. 633, 914.

2. Banks v. Poitiaux, 3 Rand. (Va.) 141, 142; 2 Min. Insts. 596.

3. Fayette Land Co. v. Louisville & N. R. Co., 93 Va. 274, 24 S. E. 1016; Litchfield v. Preston, 98 Va. 530, 37 S. E. 6; Chesapeake & O. R. Co. v. Walker, 100 Va. 69, 40 S. E. 633, 914. See ante, § 967; Va. Code, 1904, § 1105e, cl. 30.

before or after attainder, be a *grantee*; but he *cannot hold* the thing granted; for if the king or lord will, he may have it from him by forfeiture or escheat.¹

In Virginia, it is enacted that “no attainder of felony shall work a corruption of blood or forfeiture of estate;” and thus a person attainted may not only take, but may hold and dispose of lands as freely as others.²

§ 1097. **Fiduciary as Alienee.**

Trustees, agents, attorneys, and other persons occupying a fiduciary relation, cannot lawfully deal *for their own benefit*, touching the subject-matter committed to them; and any such transactions are regarded as constructively fraudulent (however transparently fair they may actually be), and are voidable at the *election of the beneficiary*.¹

1. Ante, § 967; 2 Min. Insts. 588, 659; 2 Th. Co. Lit. 214; 3 Preston, Abst. 407.

2. Ante, § 967; 2 Min. Insts. 659, 588; Va. Code, 1904, § 3883.

1. 2 Min. Insts. 659; 1 Story, Eq. Jur., §§ 311, et seq.; 3 Sugden, Vendors, 225; Fox v. Mackreth, 2 Bro. Ch. 400, 2 Cox, 320, 1 White & Tud. Lead. Cas. Eq. 105, 126, et seq.; Buckles v. Lafferty, 2 Rob. (Va.) 294, 40 Am. Dec. 752; Bailey v. Robinson, 1 Gratt. (Va.) 9, 42 Am. Dec. 540; Howery v. Helms, 20 Gratt. 7; Michoud v. Girod, 4 How. 554. See ante, § 478, et seq.

(1182)

CHAPTER XLII.

TITLE BY CONVEYANCE CONTINUED—II. THE DEED.

- § 1098. Outline of Discussion.
- 1099. Circumstances under Which a Deed Is Required.
 - Common Law Doctrine.
- 1100. Doctrine in England under Statute of Frauds.
- 1101. Doctrine in Virginia by Statute.
- 1102. General Nature of a Deed.
- 1103. Several Kinds of Deed.
 - Deeds Indented and Deeds Poll.
- 1104. Effect of Deeds Poll and Deeds Indented, Respectively, as to Persons Not Parties Thereto.
- 1105. Conveyances Made by Agents or Attorneys in Fact under Powers of Attorney.
- 1106. Competency of Parties to Deed.
- 1107. The Form and Formalities of a Deed—Discussion Outlined.
- 1108. I. Deed Written on Paper or Parchment.
- 1109. II. The Premises.
- 1110. III. The Habendum.
- 1111. IV. The Tenendum.
- 1112. V. The Reddendum.
- 1113. VI. The Condition Clause.
- 1114. VII. The Ancient Warranty or Covenant Real.
 - 1115. Effect of Ancient Warranty as to Compensation Made for Loss of Land by Title Paramount.
 - 1116. Effect of Ancient Warranty in Rebutting or Estopping the Claims of Warrantor or His Heirs.
- 1117. VIII. Personal Covenants in the Deed.
 - 1118. Personal Covenants Not Running with the Land.
 - 1119. Personal Covenants Affecting Land Not Conveyed.
 - 1120. Personal Covenants Running with the Land.
 - 1121. Personal Covenants of Title.
 - 1122. Express Covenants of Title—Enumeration.
 - 1123. 1. Covenant of Seisin.
 - 1124. 2. Covenant of Right and Power to Convey in Fee Simple.
 - 1125. 3. Covenant for Quiet Enjoyment.
 - 1126. 4. Covenant against Incumbrances.
 - 1127. 5. Covenant for Further Assurances of Title.

(1183)

- § 1128. 6. Covenant of Warranty.
General and Special Warranty.
- 1129. Application of Covenant of Special Warranty.
- 1130. Application of Covenant of General Warranty.
- 1131. Liability of Remote Grantors upon Personal Covenants of Title.
- 1132. Extent or Measure of Recovery upon Personal Covenants of Title.
- 1133. Effect of Personal Covenants of Title in Estopping Grantor to Set Up After-Acquired Title.
- 1134. IX. Conclusion of the Deed.
- 1135. X. Reading the Deed.
- 1136. XI. Sealing and Signing the Deed.
 - 1. Origin of the Seal.
 - 1137. 2. Deed to Be Signed as Well as Sealed.
 - 1138. 3. Nature of the Seal.
- Common Law Doctrine.
- 1139. Statutory Doctrine in Virginia as to Nature of Seal.
- 1140. XII. Delivery of the Deed.
- 1141. Mode of Making Delivery.
- 1142. Proof of Delivery.
- 1143. Effect of Delivery.
- 1144. Conditional Delivery or Delivery in Escrow.
- 1145. XIII. Attestation of Deed by Witnesses or Acknowledgment Thereof by Grantor.
- 1146. XIV. Registry of the Deed.
- 1147. Description of Property Conveyed.
In General.
- 1148. Various Methods of Describing Land in Conveyances—Enumeration.
 - 1149. I. Description by Government Survey.
 - 1150. II. Description by Reference to Plat or Map.
 - 1151. III. Description by Monuments, Courses and Distances, or by Metes and Bounds.
 - 1152. IV. Description of City Lots by Reference to Streets and Numbers.
 - 1153. V. Description by Reference to a Prior Conveyance.
 - 1154. VI. Description by Quantity of Land or Number of Acres.
 - 1155. VII. Effect of Deed in Passing with the Land all Buildings, Privileges and Appurtenances.

(1184)

- § 1156. The Consideration Supporting the Deed—Discussion Outlined.
1157. I. Effect of Want of Consideration.
1158. II. Effect of Recital in Conveyance of Payment of Consideration.
1159. III. Illegal Considerations in General.
1160. IV. Considerations Involving Fraud—Discussion Outlined.
1161. A. Fraud in *Esse Contractus*, That Is, in the Execution of the Conveyance.
1162. B. Fraud in the Procurement or Inducement, Directed against a Party to the Deed.
1. Actual Fraudulent Representations or Concealments.
1163. 2. Fraud Manifested in Inequitable Bargains.
1164. 3. Fraud Presumed from the Circumstances and Condition of the Parties.
1165. C. Fraud in the Procurement or Inducement, Directed against Third Persons.
- (A) Catching Bargains with Heirs, Reversioners and Other Expectants.
1166. (B) Fraud Directed against Third Persons Generally.
1167. (C) Conveyances in Fraud of Creditors and Purchasers.
- Discussion Outlined.
1168. The English Statute of Fraudulent Conveyances.
1169. The Virginia Statute of Fraudulent Conveyances.
- (I) The Terms of the Statute.
1170. (II) Validity of the Conveyance as between the Parties.
1171. (III) Who Are "Creditors" Protected by the Virginia Statute.
1172. (IV) Who Are "Purchasers" Protected by the Virginia Statute.
1173. (V) Circumstances Indicating Fraudulent Intent — Discussion Outlined.
1. General Badges of Fraud.
1174. 2. Reservation of Possession, Control or Benefits by Grantor.
1175. 3. Effect of Clause in Assignment Releasing Grantor
1176. (1185)

- from the Further Liability upon His Debts.
- § 1177. 4. Preferences of Creditors.
- 1178. 5. Fraudulent Intent Directed against Other Creditors than Those Attacking the Deed.
- 1179. (VI) Effect of Conveyance Being Voluntary—Virginia Statute of Voluntary Conveyances.
- 1180. (VII) Instances of Considerations Deemed Valuable in Law.
- 1181. 1. Marriage as a Valuable Consideration.
- 1182. 2. Wife's Relinquishment of Her Dower or Other Property Rights as a Valuable Consideration.
- 1183. (VIII) Proof of Fraud Unavailing against a Purchaser for Value and without Notice of the Fraud.
- 1184. V. Considerations Involving Mistake or Misapprehension—Discussion Outlined.
- 1185. (I) Considerations Involving Mistakes of Law.
- 1186. (II) Considerations Involving Mistakes of Fact.
- 1187. Mistakes as to Description of Land.
- 1188. Compromise of Doubtful Rights.
- 1189. Effect upon Deed Validly Executed of Matter Arising Ex Post Facto—Discussion Outlined.
- 1190. I. Effect of Erasure, Interlineation or Other Alteration.
- 1191. 1. In Case of Contract Executed.
- 1192. 2. In Case of Contract Executory.
- 1193. A. Alteration by a Stranger.
- 1194. B. Alteration by Party to Contract or One Interested.
- 1195. II. Effect of Breaking Off or Defacing the Seal.
- 1196. III. Effect of Cancelling the Deed.
- 1197. IV. Disclaimer of Title by Grantee.
- 1198. V. Effect of Disagreement of Persons Whose Concurrence Is Necessary.

§ 1098. Outline of Discussion.

We are to examine the deed usually accompanying the conveyance of land under the following heads: (1) The circum- (1186)

stances under which a deed is required; (2) The general nature of a deed; (3) The several sorts of deed; (4) Conveyances by agents and attorneys in fact under powers of attorney; (5) Capacity to execute a deed; (6) Form and formalities of the deed; (7) The description of the property conveyed; (8) The consideration; (9) Circumstances which render a deed of conveyance void.

§ 1099. Circumstances under Which a Deed Is Required—Common Law Doctrine.

No writing was required at common law for any form of conveyance, except for the conveyance of *incorporeal* rights by way of *grant*,—a form of conveyance whose use at common law was confined to the transfer or creation of those rights which were incapable of passing by *livery of seisin*, and which were therefore said to *lie in grant*.¹ Otherwise, for the transfer of *terms for years*, nothing was required but a verbal agreement, consummated by the lessee's taking possession, whether the lessor were present or not, or whether he were living or not; for the transfer of *freeholds* there must have been an agreement *in presenti*, and an actual delivery of the possession of the freehold by the vendor to the vendee, *i. e.*, a livery of seisin. Hence, lands, as to the immediate freehold thereof, were said to *lie in livery*.²

Contracts to convey either a freehold or a term for years, may, at common law, be *by parol*, without any writing whatever.³

§ 1100. Same—Doctrine in England under Statute of Frauds.

Under the English statute of Frauds and Perjuries, 29 Car.

1. Post, § 1201; ante, § 142.

2. Ante, §§ 142, 362; 2 Min. Insts. 660, 80, 184; 2 Bl. Com. 144; 1 Th. Co. Lit. 630, n. (6), 318, n. (T); 2 Th. Co. Lit. 404, n. (A), 224, n. (A).

3. Ante, § 363; post, § 1285; 2 Min. Insts. 660; 1 Th. Co. Lit. 628, 630, n. (6); Maldon's Case, Cro. Eliz. 33; Benton v. Crowell, Cro. Eliz. 306.

II, c. 3, §§ 1-4, all original estates of freehold, and for a term exceeding three years, can be conveyed only by *deed or writing*; and all *assignments*, whether of leases for years, or for life, and all *surrenders* of the same must also be by deed or note in writing. Freeholds, however, must be accompanied by livery of seisin. Those not exceeding three years can be conveyed by *parol agreement and entry*, as at common law.¹

Contracts for future conveyances, or for future leases, for *any interest whatever* in lands, are, by § 4 of the statute, required to be *in writing*, and signed by the party to be charged or his agent.²

And by the later statute, 8 & 9 Vict., c. 106 (usually termed "the statute of Grants") it is provided that all lands, as to the conveyance of the immediate freehold thereof, shall *lie in grant* as well as *in livery*,"—that is, shall pass by *deed* (alone) as well as by livery of seisin.³

§ 1101. Same—Doctrine in Virginia by Statute.

By the Virginia statute, known as "the *statute of Conveyances*" (corresponding to 29 Car. II, c. 3, §§ 1, 2, 3) it is provided that no estate of inheritance, or freehold, or for a term exceeding five years, in lands, shall be conveyed except *by deed or will*.¹

And by the Virginia statute, known as "the statute of Parol Agreements" (corresponding to 29 Car. II, c. 3, § 4), it is declared that *no action* shall be brought upon any (executory) contract for the *sale* of real estate or for the *lease thereof for more than one year*, unless the contract, or some memorandum or note thereof, be *in writing*, and *signed by the party to be charged thereby* or his agent.²

Furthermore, by the Virginia "statute of Grants" (corresponding to 8 & 9 Vict., c. 106), it is enacted that "all real es-

1. 2 Min. Insts. 660; 2 Th. Co. Lit. 404, n. (A), 566, n. (5).

2. 2 Min. Insts. 660.

3. 2 Min. Insts. 660.

1. Va. Code, 1904, § 2413; 2 Min. Insts. 661.

2. Va. Code, 1904, § 2840; 2 Min. Insts. 661.

tate shall, as regards the conveyance of the *immediate freehold* thereof, be deemed to lie in grant as well as in livery."³ And by the Virginia "statute of Future Grants" it is provided that "any interest in or claim to real estate may be disposed of by deed or will," and it is provided that "any estate may be made to commence *in futuro* by *deed* in like manner as by *will*; and any estate which would be good as an *executory devise or bequest* shall be good if created by *deed*."⁴

The effect of these statutes is that a *deed* is required, even for conveyances operating by *actual livery* at common law or for conveyances operating by *constructive livery* under the statute of Uses⁵ (that is, conveyances by bargain and sale or covenant to stand seised); and on the other hand, if there be a *deed*, that all necessity for livery, actual or constructive, is dispensed with and a conveyance (either *in presenti* or *in futuro*) may be upheld as a *grant*, which could not be sustained for any reason as a *common law* conveyance or as a conveyance under the statute of Uses.⁶

§ 1102. General Nature of a Deed.

A deed (*factum*) is a writing on parchment or paper, sealed and delivered.¹

Except under the comparatively recent statutes of Grants² (or, at common law, in case of the conveyance of *incorporeal* rights by way of *grant*³), the deed does not of itself operate *as a conveyance* of the land, but merely as an *evidence* that the land has been conveyed,—a mere muniment or evidence of the title, which, while not essential to the *validity* of the convey-

3. Va. Code, 1904, § 2417; 2 Min. Insts. 661.

4. Va. Code, 1904, § 2418.

5. Va. Code, 1904, § 2426.

6. Post, § 1235.

1. 2 Min. Insts. 661; 2 Th. Co. Lit. 224, 232; Sheppard's Touchst. 50; 2 Lom. Dig. 5. What is a *sealing*, and what a *delivery*, will be explained later. Post, §§ 1138, et seq.; 1140, et seq. See 2 Min. Insts. 661, 727, et seq.; 731, et seq.; 2 Bl. Com. 305, et seq.

2. Va. Code, 1904, §§ 2417, 2418; ante, § 1101.

3. Post, § 1201.

ance at common law, was a very common and most important accompaniment thereof, since it gave a much more secure foundation to the title than the memories of witnesses of the livery of seisin could furnish.⁴

There were many different modes of conveyance at common law, each appropriate to a particular condition of affairs, such as a "feoffment" to pass a fee simple, a "gift" to create a fee tail, a "lease" wherever there was a *reversion* in the grantor, an "exchange," a "release," a "surrender," etc., all of which will be considered hereafter.⁵ Few, if any, of these absolutely required at common law that a *deed* should accompany them, but to all a deed was the usual accompaniment because of the additional security thereby given to the title transferred.

It was not until the statute of Frauds, 29 Car. II, c. 3, §§ 1, 2, 3, that a deed or writing was *required* to accompany a conveyance of land, as we have seen.⁶ And the student will recall the corresponding Virginia statute of Conveyances, which declares that no estate of inheritance, or freehold, or for a term exceeding five years in lands shall be conveyed unless by *deed* or *will*.⁷

It is worthy of note that if a deed be lost or destroyed, a court of equity has jurisdiction to set it up and establish it upon proof of its contents, and when so set up in a suit wherein the court has jurisdiction of the parties and the subject matter, the decree of the court and the deed made in pursuance thereof are proper evidence of the passing of the title by the lost deed, and cannot be assailed in a *collateral* proceeding.⁸

§ 1103. Several Kinds of Deed—Deeds Indented and Poll.

Deeds are either (1) Deeds *indented*, or (2) Deeds *poll*.

A deed indented (or indenture) is a deed *inter partes*, where the parties on opposite sides *mutually stipulate*.¹

4. Ante, § 142.

5. Post, § 1197, et seq.

6. Ante, §§ 1099, 1100.

7. Va. Code, 1904, § 2413.

8. Building, L. & W. Co. v. Fray, 96 Va. 560, 32 S. E. 58.

1. 2 Min. Insts. 662; 2 Lom. Dig. 6.

A deed indented, or an indenture is so called because originally all deeds *inter partes*, where the parties mutually stipulated, were indented or *toothed* like a saw, on the edge; a practice which is accounted for thus: Formerly, deeds being more concise than they have since become, it was usual to write both *parts* (each party having a copy— a *part*, as it was called), on the same piece of parchment, with some word, or letters of the alphabet written between them, through which the parchment was cut, either in a straight or indented line (more frequently the latter), in such a manner as to leave half the word on one part and half on the other. Deeds thus made were denominated *syngrapha* by the canonists; and with us *chirographa*, or hand-writings; the word *chirographum* being usually that which is divided in making the indenture; and this custom was still preserved in England, in making out the indentures of a *fine*, down to a very recent period (A. D. 1834), when, by statute 3 & 4 Wm. IV, c. 74, fines were abolished. But for many generations past, in ordinary transactions, indenting only is used; or rather cutting the parchment or paper in a *waving line* on the top or side, without cutting through any letters at all; and it seems now to serve little other purpose than to give name to the species of the deed. Indeed, the better opinion is that it is the deed's being *inter partes*, that is, containing mutual stipulations between the parties, and not its having its top or side indented, which constitutes an *indenture*. When the several parts of an indenture are interchangeably executed by the several parties, that part or copy which is executed by the grantor is usually styled the *original*, and the rest are *counterparts*; though in modern times it is most frequent for all the parties to execute every part, which renders them all originals.²

A deed *poll*, on the other hand, is a deed, the stipulations of which are altogether *on one side*, without any reciprocal stipulations on the other.³ It owes its designation to the fact that originally it was not indented on the edge, but *smooth* (*factum*

2. 2 Min. Insts. 662, 663; 2 Lom. Dig. 6; 2 Bl. Com. 295, 296; Williams, Real Prop., 74, 75; Currie v. Donald, 2 Wash. (Va.) 63.

3. 2 Min. Insts. 663; 2 Lom. Dig. 6.

politum).⁴ The deed poll is not, strictly speaking, an agreement between two or more persons, but a declaration under seal by some one or more particular persons respecting an agreement or stipulation made by him or them with some other person or persons.⁵

§ 1104. Same—Effect of Deeds Poll and Deeds Indented, Respectively, as to Persons Not Parties Thereto.

A deed *poll*, whether deriving its effect from the common law or some statute, does, immediately upon its execution by the grantor, divest the estate out of him, and put it in the party to whom it is by the deed appointed to pass, though in his absence, and without notice to him, till some *disagreement* to such estate appears. No man, indeed, can be forced to take an estate against his will; but the law naturally presumes that every estate is *beneficial* to the party to whom it is given, and, therefore, that he assents to it until and unless he renounces it. And hence, in such cases, the assent of the grantee is implied, first, because of the supposed benefit; secondly, because it is incongruous and absurd that when a conveyance, at least by a deed poll, is completely executed on the grantor's part, the estate should continue in him; thirdly, and especially, in order to prevent any uncertainty as to where the freehold is vested. Accordingly, while on the one hand *acceptance* of a deed is not essential to give it validity, *dissent* is one of the modes of avoiding it.¹

4. 2 Min. Insts. 663; 2 Bl. Com. 296.

5. 2 Min. Insts. 900.

1. 2 Min. Insts. 900, 901; 2 Lom. Dig. 6, 7; 2 Bl. Com. 309; Shepard's Touchst. 285; Butler & Baker's Case, 3 Co. 26 b, n. (E); Townsend v. Tickell, 3 B. & Ald. 31; Garnons v. Knight, 5 B. & Cr. 671; Skipwith v. Cunningham, 8 Leigh (Va.) 281, et seq., 31 Am. Dec. 642. If the grantee accepts a deed, without himself executing it, the deed containing what purports to be covenants on his part to pay notes given for deferred purchase money, his *acceptance* of the deed binds him to observe such promises or undertakings as are therein imposed upon him, but his obligation is not in the nature of a promise *under seal*, but a *simple contract only*. Taylor v. Forbes, 101 Va. 663, 44 S. E. 888.

(1192)

There would have been no occasion, therefore, for the statutory provision, presently to be mentioned, so far as relates to absolute conveyances by *deed poll*.

A *deed indented*, or an indenture, on the other hand, is a mutual agreement between two or more persons, whereby each stipulates for something on his part. And where a conveyance is effected by means of such a deed, although at common law, if a limitation were made by way of *remainder* to a stranger, not a party to the deed, it is valid if the stranger, upon the determination of the particular estate, enters and agrees to have the lands by force of the indenture; so that he would thereupon be bound to perform any conditions contained in the indenture; yet no stranger can take, in this case, any *present estate in possession*, because he is a stranger to the deed.²

To meet and obviate any inconvenience from this doctrine of the common law, which, as already observed, would, as to absolute conveyances, be confined to such as are effected by *deeds indented*, it is enacted that "an *immediate* estate, or interest in or the benefit of a condition respecting any estate, may be taken by a person under an instrument, although he *be not a party thereto*."³

§ 1105. Conveyances Made by Agents or Attorneys in Fact under Powers of Attorney.

Because of the owner's prolonged absence or his non-residence, or for other reasons, it is sometimes necessary or convenient to appoint an agent who may make a valid conveyance of one's land.

An important distinction exists between such an agent or attorney in fact and the ordinary "real estate agent" or broker (whose function is merely to bring the vendor and vendee together) in respect to the *form* of the authority given them, respectively.

In the case of the real estate agent or broker, his authority is

2. 2 Min. Insts. 901; 2 Th. Co. Lit. 130, 131; *Ross v. Milne*, 12 Leigh (Va.) 218, 37 Am. Dec. 646; *Jones v. Thomas*, 21 Gratt. (Va.) 98.

3. Va. Code, 1904, § 2415; 2 Min. Insts. 901.

not to *convey* the land or any interest therein, and need not therefore be under seal, nor, independently of statute, even in writing. He performs his duty and is entitled to his commissions when he procures a purchaser who is ready, willing and able to buy upon the terms laid down by the vendor.¹

But if the agent's authority extends to the *execution of a conveyance* in the name of his principal, it is a general rule that one acting under a *power of attorney* cannot execute for his principal a sealed instrument, unless the power of attorney be *sealed*. The authority must be equal in dignity and solemnity with the thing to be done.² This is true, even though the agent's authority extends only to the filling in of a blank space in a deed.³

And although it is an established rule that one *partner* cannot bind the other partners by *deed*, without a sealed authority,⁴ yet if the deed be made *in the partners' presence* and *by their authority*, though oral only, it is good and binding upon them.⁵ And if it be an act not *requiring* a sealed instrument (such as

1. *Gelatt v. Ridge*, 117 Mo. 553, 38 Am. St. Rep. 683, note; *Barthell v. Peter*, 88 Wis. 316, 43 Am. St. Rep. 906. Nor can he be deprived of his commissions by a failure of title. Note to *Kalley v. Baker*, 28 Am. St. Rep. 547; *Barthell v. Peter*, *supra*. And where the agent agrees to receive his commissions ratably out of each payment as made, and there is a clause in the contract of sale providing for a forfeiture of all past payments and the rescission of the contract upon failure of the vendee to meet any payment at maturity, to which the agent assented, upon a default, this stipulation was enforced, and it was held that the agent was not entitled to his commissions upon the future payments. *Murray v. Rickard*, 103 Va. 132, 48 S. E. 871.

2. 2 Min. Insts. 730; *Sheppard's Touchst.* 57; 2 Rob. Pr. (2d ed.) 14, et seq.; Com. Dig. Attor. (C, 1), (C, 5); *Harrison v. Jackson*, 7 T. R. 209; *Elliott v. Davis*, 2 Bos. & P. 338; *Berkeley v. Hardy*, 5 B. & Cr. 355; *Preston v. Hull*, 23 Gratt. (Va.) 616, 14 Am. Rep. 153; *Hotchkiss v. Middlekauf*, 96 Va. 649, 43 L. R. A. 806, 32 S. E. 36; *United States v. Nelson*, 2 Brock (U. S. C. C.) 64. But see *Butler v. United States*, 21 Wall. 273.

3. 2 Min. Insts. 739; post, § 1192, note 6.

4. *Harrison v. Jackson*, 7 T. R. 207; 2 Min. Insts. 730.

5. 2 Min. Insts. 730; *Ball v. Dunsterville*, 4 T. R. 313; *Burn v. Burn*, 3 Ves. Jr. 578. The same principle applies to other cases of agency. (1194)

the assignment of the personal chattels of the partnership), it seems to be valid where it is done with the partner's consent, although *not in his presence*, not as the party's *deed*, but as an instrument of assent.⁶

It is to be observed that powers of attorney are construed strictly, and, though the intention of the parties is to be considered in construing the language used, the authority of the attorney can never be considered to be greater than that warranted by the *language* of the instrument or *indispensable to the effective operation* of such authority. Hence, a power of attorney which merely authorizes the agent to *demand and receive* all real and personal property of the principal does not confer authority to sell and convey his real estate.⁷

A conveyance made by an attorney in fact ought, according to every consideration of good sense, to be made in the name, not of the attorney, but of the principal; and accordingly, the common law reasonably holds conveyances made in the *name of the attorney*, notwithstanding they purport to be made by him *as attorney in fact*, to be inoperative to transfer title.⁸

It has been held, however, that although the words of conveyance were those of the attorney, yet if purporting to be in his capacity as attorney, and the instrument be signed with the *name of the principal*, by the attorney, it operates to convey the estate;² and if the words of conveyance be the words of the

6. 2 Min. Insts. 730; *Hunter v. Parker*, 7 M. & W. 344; *Burton v. Burton*, 1 Chit. 707; *McCullough v. Sommerville*, 8 Leigh (Va.) 419, 430; *Forkner v. Stuart*, 6 Gratt. (Va.) 206; *Anderson v. Tompkins*, 1 Brock (U. S. C. C.) 462.

7. *Hotchkiss v. Middlekauf*, 96 Va. 649, 43 L. R. A. 806, 32 S. E. 36.

8. 2 Min. Insts. 901; *Bac. Abr. Lease* (I), 10; *Combe's Case*, 9 Co. 75a, 76b; *Frontin v. Small*, 2 Ld. Raym. 1418; *White v. Cuyler*, 6 T. R. 176; *Clark v. Courtney*, 5 Pet. 349; *Jones v. Carter*, 4 Hen. & M. (Va.) 184; *Martin v. Flowers*, 8 Leigh (Va.) 158, 162; *Stinchcomb v. Marsh*, 15 Gratt. (Va.) 202, 210. See *Shanks v. Lancaster*, 5 Gratt. 119, 50 Am. Dec. 108.

9. 2 Min. Insts. 730; *Shanks v. Lancaster*, 5 Gratt. (Va.) 119, 50 Am. Dec. 108.

principal, the manner of signing it is of no importance; it may be either. "*P. by A.*," or "*A for P.*"¹⁰

This principle, however, proving inconvenient to that class of persons who cannot be prevailed upon to bestow either thought or pains upon the transaction of their business whilst it is in progress, and who are apt to be afterwards proportionately clamorous to have the consequences of their negligence repaired by some special interposition, it is enacted that "If in a deed made by one as attorney in fact for another, the *words of conveyance*, or the *signature*, be in the name of the *attorney*, it shall be as much the principal's deed as if the words of conveyance or the signature were in the name of the principal by the attorney, if it be *manifest* on the face of the deed that it should be construed to be that of the principal, to give effect to its intent."¹¹

In conclusion, it may be remarked that a power of attorney to execute a deed, like any other agency, is revocable at the pleasure of the principal, even though it be expressly stipulated to

10. 2 Min. Insts. 730; 2 Lom. Dig. 31; *Jones v. Carter*, 4 Hen. & M. (Va.) 184; *Shanks v. Lancaster*, 5 Gratt. (Va.) 119, 50 Am. Dec. 108; *Bryan v. Stump*, 8 Gratt. 241, 56 Am. Dec. 139; *Stinchcomb v. Marsh*, 15 Gratt. 209, et seq.

11. Va. Code, 1904, § 2416; 2 Min. Insts. 902. It may be allowed to doubt whether it be wise by such provisions as this to encourage that looseness in business transactions which is the parent of uncertainty, and therefore of litigation. The case of *Stinchcomb v. Marsh*, 15 Gratt. (Va.) 209, 210, well illustrates the confusion and doubt which this statutory rule may occasion; for had that case occurred after the enactment of the statute, the power might and perhaps ought to have been considered well executed, notwithstanding its gross irregularities; although it seems impossible to contemplate the facts without perceiving that they could not fail to engender a doubt of what was really intended; and thus under the statute to give countenance to pretensions which, according to the common law doctrine, could have been maintained with little confidence, and only as the last desperate resort of a hopeless litigant. See the well considered observations of Judge Lee, pronouncing the opinion of the court, in the same case, p. 211; 2 Min. Inst. 902.

(1196)

be irrevocable,¹² unless it be *coupled with an interest* in the land, in which case it is irrevocable, so long as the interest continues, even without express contract to that effect.¹³ Like other agencies also, unless coupled with an interest, it is revoked by the *death* of the principal.¹⁴

§ 1106. Competency of Parties to Deed.

The grantor in the deed must of course be legally competent to execute the conveyance, and the grantee to receive the land under the deed. This topic of the capacity to aliene and to be an alienee has already been considered, and the student is referred to that discussion.¹

§ 1107. The Form and Formalities of a Deed—Discussion Outlined.

Below¹ is appended a form of an ancient charter or deed of

12. *Angle v. Marshall*, 55 W. Va. 671, 679, 47 S. E. 882; *Rowan v. Hull*, 55 W. Va. 335, 47 S. E. 92. If revoked, there may of course be an action upon the breach of the contract.

13. *Sulphur Mines Co. v. Thompson*, 93 Va. 293, 25 S. E. 232; *Angle v. Marshall*, 55 W. Va. 671, 679, 47 S. E. 882.

14. *Sulphur Mines Co. v. Thompson*, 93 Va. 293, 25 S. E. 232; *Angle v. Marshall*, 55 W. Va. 671, 679, 47 S. E. 882.

1. Ante, §§ 1073, et seq.; 1086, et seq.

1. Ancient Charter or Deed of Feoffment (Deed Poll).

Premises.

Know all men that I, William, son of William de Segenho, have given, granted, and by this my present deed have confirmed unto John, son of the late John de Saleford, in consideration of a certain sum of money to me in hand paid beforehand, one acre of my arable land, lying in Saleford plain, adjacent to the land of the late Richard de la Mere; to HAVE and to HOLD the whole of the aforesaid acre of land, with all its appurtenances, unto the said John and his heirs and assigns, of the chief lords of the fee; *Rendering* and doing annually, to the said chief lords therefor, due and accustomed service. And I, the aforesaid William, and my heirs and assigns, the whole of the aforesaid acre of land, with all its appurtenances, to the aforesaid John de Saleford, and his heirs and as-

Habendum
and
Tenendum.
Reddendum
Warranty.

Conclusion.

(1197)

feoffment, which the student is advised to study carefully, as presenting a simple illustration of the formal and orderly parts of a deed of conveyance. For purposes of comparison and study, a form of a modern deed of *bargain and sale* (in the form of an *indenture*) is also appended.²

signs, against all persons will warrant forever. In testimony whereof, to this present deed I have affixed my seal: In the presence of the following witnesses, Nigel de Saleford, John the miller of the same town, and others. *Dated* at Saleford, on Friday next before the feast of Saint Mary the Virgin, in the sixth year of the Reign of King EDWARD, son of King EDWARD.

L. S.

Livery of Seisin endorsed.

MEMORANDUM, that on the day and year within written, full and quiet seisin of the within specified acre, with the appurtenances, was given, and delivered by the within-named William de Segenho, to the within-named John de Saleford, in their proper persons, according to the tenor and effect of the within-written deed, in the presence of Nigel de Saleford, John de Seybrooke, and others.

2. *Conveyance of Lands by Bargain and Sale (Indenture.)*

(4 Min. Insts. 1596.)

This indenture, made this — day of —, in the year of our Lord 18—, between C. C., of —, and E., his wife, of the one part, and D. D., of —, of the other part—WITNESSETH, that the said C. C., and E., his wife, for and in consideration of the sum of — dollars to them in hand paid, at and before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, do hereby grant, bargain, sell, release and confirm to the said D. D., and his heirs and assigns for ever, with general warranty, all of that certain tract or parcel of land lying in —, and containing by estimation [*or by recent survey*] — acres, be the same, however, ever so much more or less, and bounded as follows, to wit: Beginning at [*describe the boundaries of the land*]. Together with all the appurtenances to the said land belonging or in any wise appertaining. To have and to hold the said tract or parcel of land, with its appurtenances aforesaid, unto the said D. D., his heirs and assigns for ever.

And the said C. C., for himself and his heirs, doth covenant and agree with the said D. D., his heirs and assigns, in manner and form following to wit:

(1198)

The various formal parts and formalities of a deed³ are com-

That the said C. C. [or "the said C. C., and E., his said wife"] is [or "are"] seised in fee-simple of the said tract or parcel of land, with its appurtenances aforesaid.

That the said C. C., and E., his wife, have good right and lawful power to convey the said tract or parcel of land, with its said appurtenances, to the said D. D. in fee-simple.

That the said D. D., and his heirs and assigns, shall have quiet and peaceable possession of the said land, and its appurtenances aforesaid, for ever.

That the said tract or parcel of land, with its appurtenances aforesaid, is free from all incumbrances and charges whatsoever; and

That the said C. C., and E., his wife, will execute such further assurances of and for the said land, and its appurtenances, as may be requisite to make the title thereto of the said D. D., his heirs and assigns, sure and complete for ever.

Witness the hands and seals of the parties, the day and year first above written.

C. C. [SEAL.]

E. C. [SEAL.]

D. D. [SEAL.]

If there are no stipulations to be made by the grantee, the form of the deed may be altered to that of a deed *poll*, thus:

(Deed Poll.)

Know all men that C. C., and E., his wife, for and in consideration of — dollars to them in hand paid, at and before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, do grant, bargain, sell, release, and confirm unto D. D., of —, his heirs and assigns, forever, with general warranty, all that tract or parcel of land, etc. [*as in the form above, and as no date is mentioned in the beginning, the conclusion would be:*]

Witness the hands and seals of the said C. C., and E., his wife, this — day of —, in the year of our Lord 18—.

3. It is not absolutely necessary in law to have all the formal parts that are usually drawn out in deeds, so as there be sufficient words to declare, clearly and legally, the party's meaning. But as those formal and orderly parts are calculated to convey that meaning in the clearest, distinctest, and most effectual manner, and have been well considered and settled by the wisdom of successive ages, it is prudent not to depart from them without good reason, or urgent necessity. Frequently the reason for using particular expressions

(1199)

monly enumerated as follows: (1) Deed must be written on paper or parchment; (2) The premises; (3) The habendum; (4) The tenendum; (5) The reddendum; (6) The conditions; (7) The warranty; (8) The covenants; (9) The conclusion of the deed; (10) The reading of the deed; (11) Sealing and signing the deed; (12) Delivery of the deed; (13) Attestation or acknowledgment of the deed; (14) Recordation of the deed.⁴

§ 1108. I. Deed Written on Paper or Parchment.

A deed may be written or printed in any character or language, and, it is believed, in ink, or with pencil; but it must be upon *paper or parchment*; for if written on stone, board, linen, leather, steel, or brass, or the like, it is no deed, although it is doubtless a good agreement in writing. Wood, stone, or steel, may be more durable, and linen less liable to rasures; but writing on paper or parchment unites in itself, more perfectly than any other way, both those desirable qualities; for there is nothing else so durable, and at the same time so little liable to alteration; nothing so secure from alteration, that is at the same time so durable. It must have also the regular *stamps* required by the stamp law (if any such enactments are in existence), or else it cannot perhaps, be given in evidence, and under circumstances, may be *void*.¹

§ 1109. II. The Premises.

The premises contain the names of the parties; the recital of whatever circumstances may be needful to explain the reasons

will appear after many years' study, when before, upon a cursory consideration, the words seemed unnecessary, if not improper. 2 Min. Insts. 705; 2 Bl. Com. 298, n's (7), (8); 4 Kent, Com. 460, 461.

4. See 2 Min. Insts. 705; 2 Bl. Com. 298, et seq.

1. 2 Min. Insts. 704; 2 Bl. Com. 297; Chitty, Cont. 72; Schneider v. Morris, 2 M. & S. 285, et seq.; Geary v. Physic, 5 B. & Cr. 234; Jeffrey v. Walton, 1 Stark. 267; Rymes v. Clarkson, 1 Phil. 22; Dickinson v. Dickinson, 2 Phil. 173; Green v. Skipwith, 1 Phil. 53; Hale v. Wilkinson, 21 Gratt. (Va.) 78; Talley v. Robinson, 22 Gratt. 896; Campbell v. Wilcox, 10 Wall. 421; Carpenter v. Snellings, 97 Mass. 452.

(1200)

of the transaction; the consideration which induced the deed; the recital of payment of purchase money or part thereof; and whatever is necessary to make it clearly intelligible what is the subject of the grant, and who is the grantor and the grantee.¹

While the premises should designate the name of the *grantor* with reasonable certainty, it is sufficient if the description is accurate enough to *identify* him, even though the name given in the instrument be not his actual name.² Thus, a conveyance by "the heirs" of a decedent is good, provided such heirs can be identified;³ and a conveyance in the first person, if signed by the grantor in such manner as to identify him, would also be good, at least, if there be only one grantor.⁴

But if there are several grantors, as where a husband and wife, or two co-owners, unite in a deed, each grantor should be named in the premises as a *grantor* in the deed, and the mere signing of the deed by one not so named will not pass his or her interest in the property conveyed.⁵

Upon the same principle the *grantee* must be named in the conveyance or so described as to be capable of identification.⁶

1. 2 Min. Insts. 705; 2 Bl. Com. 298; 2 Th. Co. Lit. 240; Sheppard's Touchst. 52, 74.

2. Jenkins v. Jenkins, 148 Penn. St. 216, 23 Atl. 985; Houx v. Batteen, 68 Mo. 84; Nicodemus v. Young, 90 Ia. 423.

3. Blaisdell v. Morse, 75 Me. 542.

4. 2 Tiffany, Real Prop., § 380; Elliott v. Sleeper, 2 N. H. 525; Jackson v. Root, 18 Johns. (N. Y.) 60; Hutchins v. Carleton, 19 N. H. 487. But see Peabody v. Hewett, 52 Me. 33, 83 Am. Dec. 486.

5. Ante, § 1081; 2 Min. Insts. 654; 2 Tiffany, Real Prop., § 380; Sexton v. Pickering, 3 Rand. (Va.) 468; Green v. Claiborne, 83 Va. 386, 5 S. E. 376; Taylor v. Cussen, 90 Va. 40, 17 S. E. 721; Leavitt v. Lamprey, 13 Pick. (Mass.) 382, 23 Am. Dec. 685; Greenough v. Turner, 11 Gray (Mass.) 334; Batchelor v. Brereton, 112 U. S. 396; Laughlin v. Fream, 14 W. Va. 322; Stone v. Sledge, 87 Tex. 49, 47 Am. St. Rep. 65; Prather v. McDowell, 8 Bush (Ky.) 46; Harrison v. Simons, 55 Ala. 510. But see Elliott v. Sleeper, 2 N. H. 525; Woodward v. Leaver, 38 N. H. 29; Armstrong v. Stovall, 26 Miss. 275; Hrouska v. Janke, 66 Wis. 252.

6. Ante, § 1087; 2 Min. Insts. 657; 2 Tiffany, Real Prop., § 380; Woods v. Boyd, 28 Ark. 75; Simmons v. Spratt, 20 Fla. 495; Hardin (1201)

A conveyance to a grantee already dead is, as we have seen, *void*,⁷ but if the deed is to the *heirs* of a dead man, they are susceptible of identification, and the deed is valid.⁸

§ 1110. III. The *Habendum*.

The function of the *habendum* is to determine what *estate or interest* is granted by the deed, although this may be, and generally is, stated in the premises. In which case the *habendum* may lessen, enlarge, explain, or qualify, but not totally contradict, or be repugnant to the estate granted in the premises. In case of such irreconcilable repugnancy, the *premises generally prevail*, for the *habendum* cannot divest an estate already vested by the premises.¹

Thus, at common law, upon a grant (in the *premises*) "to A and the heirs of his body," *habendum*, "to him and his heirs forever," A would take a fee tail, with a *remainder in fee simple* expectant thereon; but had the premises been "to A and his heirs," *habendum*, "to him for life," the *habendum* would be utterly void, for an estate of inheritance is vested in A before the *habendum* comes, and is not to be subsequently divested or taken away by it,—unless, at least, a contrary intent can be clearly gathered from the whole deed.²

An exception to this general doctrine is suggested by the Virginia case of *Humphrey v. Foster*,³ arising out of the statute dispensing with words of limitation, and declaring that every conveyance shall pass a *fee simple* unless "a *contrary intention* shall appear by the conveyance."⁴ In the case referred to, the deed

v. Hardin, 32 S. C. 599; *Wright v. Lancaster*, 48 Tex. 250; *Thomas v. Wyatt*, 31 Mo. 188.

7. Ante, § 1088.

8. 2 *Tiffany*, Real Prop., § 380; *Shaw v. Loud*, 12 Mass. 447; *Gearheart v. Thorp*, 9 B. Mon. (Ky.) 31; *Boone v. Moore*, 14 Mo. 421.

1. 2 Min. Insts 705; 2 Bl. Com. 298; 2 Lom. Dig. 288; 2 Th. Co. Lit. 241. See *Temple v. Wright*, 94 Va. 338, 26 S. E. 844, 3 Va. Law Reg. 44; *Keister v. Keister*, 99 Va. 541, 39 S. E. 164.

2. 2 Bl. Com. 298. See *Temple v. Wright*, 94 Va. 338, 26 S. E. 844, 3 Va. Law Reg. 44.

3. 13 Gratt. (Va.) 653.

4. Va Code, 1904, § 2420.

(1202)

conveyed the land to the grantee *for ever* (without words of inheritance) *habendum* *for life*; and it was held that, as the *premises* only conveyed a fee by virtue of the statute, and by the statute *the whole deed* is to be looked to, in order to ascertain what was intended to be passed, the *habendum* was not void, but only a life estate passed by the deed.⁵

And even independently of this statute, a deed which, by the premises or an earlier part of the *habendum*, appears to create a *joint estate in fee simple* may, by a later clause, reduce the same to an estate *for life* in one of the grantees, with a remainder in fee to the other;⁶ and a deed, creating in the *premises* an estate by entireties between husband and wife, may by the *habendum* give an estate to the husband alone.⁷

But the fact that the *habendum* mentions as grantees not only the person or persons named in the premises but also *another person*, does not make the latter a *joint grantee* with the others, though it may perhaps enable him to take by way of *remainder*.⁸

§ 1111. IV. The Tenendum.

In modern times, even in England, the *tenendum* is of little practical use, and in deeds conveying a fee simple is retained only by custom. It was formerly employed to set forth the *feudal service* to be rendered for the land by the grantee; and also to show *of whom* the land was to be holden; but as the statute of *quia emptores* (18 Edw. I, c. 1) has caused all fee simple lands to be held of the chief lords of the fee, and as all tenures, with a few unimportant exceptions, were by 12 Car. II, c. 24, reduced to free and common socage, the occasion for the clause of

5. 2 Min. Insts. 705, 706; *Humphrey v. Foster*, 13 Gratt. (Va.) 653. See *Baskett v. Sellars*, 93 Ky. 2; *Bodine v. Arthur*, 91 Ky. 53, 34 Am. St. Rep. 162; *Kelley v. Hill* (Md.), 25 Atl. 919.

6. *Temple v. Wright*, 94 Va. 338, 26 S. E. 844, 3 Va. Law Reg. 44.

7. *Keister v. Keister*, 99 Va. 541, 39 S. E. 164.

8. 2 Tiffany, Real Prop., § 382; *Sheppard's Touchst.* 237; *Samme's Case*, 13 Co. 54; *Blair v. Osborne*, 84 N. C. 417; *Hafner v. Irwin*, 20 N. C. 433, 34 Am. Dec. 390; *Moore v. Waco*, 85 Tex. 206. But see *McLeod v. Tarrant*, 39 S. C. 271.

tenendum, in conveyances in fee simple, has in a great degree passed away, and it is usually pretermitted.¹

And in Virginia, where all feudal tenures are abolished,² the *tenendum* is improper, or at least superfluous, in conveyances of the fee simple.³

§ 1112. V. The Reddendum.

The function of the *reddendum* is to set forth the return (*red-itus*), which in feudal times, for the most part, accompanied all conveyances, even those in fee simple, being generally military services. The *reddendum* may still be properly used in conveyances in fee, when (as sometimes happens) an annual or periodical rent is reserved as a compensation or return for the property; and in conveyances for life, for years, or at will, a clause of *reddendum* is by no means infrequent. A *reddendum*, it will be observed, must be to the *grantors*, or some, or one of them, and not to any *stranger* to the deed.¹

Futhermore, the *reddendum* or reservation clause is, in this country at least, frequently used for the purpose of retaining in the grantor certain incorporeal rights or easements in the land conveyed.²

1. 2 Min. Insts. 706; 2 Bl. Com. 298, 299; 2 Th. Co. Lit. 241, 242, n. (R); Sheppard's Touchst. 52, 79.

2. Ante, § 16; 10 Hen. Stats. 65.

3. 2 Min. Insts. 706.

1. 2 Min. Insts. 706; 2 Bl. Com. 299; 2 Th. Co. Lit. 142, n. (S); Sheppard's Touchst. 52, 80.

2. Ante, § 101; *Claffin v. Railroad Co.*, 157 Mass. 489; *Grafton v. Moir*, 130 N. Y. 465, 27 Am. St. Rep. 533; *Kister v. Reeser*, 98 Penn. St. 1, 42 Am. Rep. 608; *Haggerty v. Lee*, 50 N. J. Eq. 464; *Chappell v. Railway Co.*, 62 Conn. 195. This is contrary to the common law idea of a reservation, which was that the grantor thereby reserved to himself some *new thing issuing out of* the thing granted, not before *in esse*; e. g., rent; ante, § 101; *Doe v. Lock*, 2 Ad. & E. 743; *Durham, etc., R. Co. v. Walker*, 2 Q. B. 940. Accordingly, it has been held in England that an easement cannot thus be created by a mere reservation; and where it appears to be so, it is in reality a *re-grant* by the grantee, such an effect not being given to it unless the grantee also (1204)

§ 1113. VI. The Condition Clause.

It is unnecessary to repeat here the principles controlling conditions, which have already been quite fully examined.¹

In practice, most conveyances in fee simple are unconditional; and of course, if no conditions are to be stipulated, there will be no condition clause in the deed.²

§ 1114. VII. The Ancient Warranty or Covenant Real.

"A warranty," says Lord Coke, "is a *covenant real* annexed to lands or tenements, whereby a man and his heirs are bound to warrant the same; and either upon *voucher* or by judgment in a writ of *warrantia chartæ*, to yield other lands and tenements to the value of those that shall be evicted by a former title; or else may be used by way of *rebutter*;" that is, to repel or rebut the claims of the grantor himself, or of his heirs, to the lands. It extends to no lease for years or to any other chattel, and if proper words of warranty are applied to such interests they are to be construed as creating only a personal covenant.¹

Warranty may be either: (1) Implied, or (2) Express.

It is *implied* wherever, upon the conveyance of a *freehold*, there is a *reversion in the grantor* and the land is held of him. At common law, this is the case even in conveyances in fee simple, and, therefore, a warranty at common law is implied in all cases of *freehold* conveyances, at least where the word *dedi* is used. But when the statute *Quia emptores* (18 Edw. I, c. 1) had declared that, upon conveyances in fee simple, the *tenure* should be, not of the grantor, but of the *chief lord* of the fee, *implied* warranty became limited to tenants in tail, for life and for years, although in estates for years, it is only a *personal covenant*; but in the case of freeholds (*i. e.*, of estates tail and

has signed the deed. Ante, § 101; Tiffany, Real Prop., §§ 316, 383; Durham, etc., R. Co. v. Walker, *supra*; Wickham v. Hawker, 7 M. & W. 63; Corporation of London v. Riggs 13 Ch. Div. 798.

1. Ante, § 525, et seq.

2. 2 Min. Insts. 706, 707.

1. 2 Th. Co. Lit. 245, 249, n. (D), 250, n. (F); 2 Min. Insts. 707; 2 Bl. Com. 300; Williamson v. Codrington, 1 Ves. Sr. 516.

for life), a warranty is implied only where the word *dedi* is used; and with us, as well as in England, upon a conveyance in fee simple, the grantor is no further liable for the title than he expressly covenants to be, except in case of *fraud or material mistake*, and except also in case of partition or exchange of lands, where either party is evicted of his share, in which case the other and his heirs, are bound to warranty, for which no better reason is given than that they enjoy the equivalent *in land*.²

Express technical warranty can be created by no word whatsoever, except *warrantizo*, or in English *warrant*. If any other word or phrase be substituted, or be joined with the word *warrant* (save only the auxiliary *will* or *shall*), it is not the ancient "covenant real," but becomes a modern personal covenant of title. And so also, an ancient warranty can be annexed to no estate *less than freehold*; and hence, if the proper words of warranty be applied to a lease for years, or to any chattel, it is a personal covenant; so that, if a conveyance of land in fee simple comprised chattels also, the same words ("I will warrant") are construed as creating an ancient warranty as to the land, and a personal covenant as to the chattels. Hence, if the grantor says "I will warrant" the land, etc., it is the *ancient warranty*; but "I will warrant *and defend*," or "I covenant, or agree to warrant," or "I will warrant a *term for years*," etc., are modern and personal covenants of title. And it should be observed, that an express warranty always supersedes one implied.³

Ancient warranty, as it affects the *heirs* of the warrantor, is of three sorts: (1) lineal, (2) collateral, and (3) commencing by disseisin.

(1) The lineal warranty is that which descends *in the same*

2. Ante, §§ 5, 89; 2 Min. Insts. 707, 708; 2 Bl. Com. 300; 2 Th. Co. Lit. 252, 253, n. (K); Rawle, Cov. Tit. 353, et seq.; Williams v. Burrell, 1 Co. B. 429, et seq.; Black v. Gilmore, 9 Leigh (Va.) 448, 449, 33 Am. Dec. 253.

3. 2 Min. Insts. 708; 2 Bl. Com. 301; 2 Th. Co. Lit. 250, et seq. n's (D), (F), 256; 2 Lom. Dig. 318, 321; Nokes' Case, 4 Co. 80b; Williams v. Codrington, 1 Ves. Sr. 511; Tabb v. Binford, 4 Leigh (Va.) 132, 26 Am. Dec. 317.

(1206)

line with the land warranted, that is, in the same line that the land would have descended in, had it not been sold, and that, whether the *descent* be lineal or collateral. Thus, if the owner of land sells it with warranty, and then dies leaving his *nephew* as his heir, the *warranty* is lineal, while the *descent* of it from the uncle to the nephew is collateral.⁴

(2) The collateral warranty means a warranty that descends, *not in the same line* with the land warranted, but from a different ancestor. Thus, if a tenant by the curtesy or in dower aliene his or her life estate in *fee simple* with warranty, and then die leaving a son, the common heir of both parents, the warranty is collateral, because it descends from one parent while the land descends from the other.⁵

(3) Warranty *commencing by disseisin* arises where the very conveyance in which the warranty is found immediately follows an act of *disseisin* by the warranting ancestor perpetrated against the heir or against the ancestor on the other side, or where the conveyance itself operates as such (as where a father, tenant *for years*, with remainder to his son in fee, alienes to a stranger in fee simple, with warranty). Such warranty, being founded on tort or wrong of the warrantor himself, is too palpably injurious to be supported, and is not binding, even at common law, upon the warrantor's heirs; for it cannot be presumed that an ancestor unjust enough to commit such a wrong against his heir will be so just as to leave him a recompense. Warranty by disseisin, it will be observed, is in all cases *collateral*.⁶

In Virginia it is enacted that "when the deed of the alienor mentions that he and *his heirs* will warrant what it purports to pass or assure, if *any thing descends* from him, his heirs shall be *barred* for the value of what is so descended or *liable* for such value."⁷

4. 2 Min. Insts. 708; 2 Bl. Com. 301; 2 Th. Co. Lit. 274, 278, et seq., n. (M. 1).

5. 2 Min. Insts. 708; 2 Bl. Com. 301, 302; 2 Th. Co. Lit. 274, et seq. See *Urquhart v. Clarke*, 2 Rand. (Va.) 549.

6. 2 Min. Insts. 709; 2 Bl. Com. 302; 2 Th. Co. Lit. 297, n. (2), 302.

7. Va. Code, 1904, § 2419.

This statute, it is believed, virtually abolishes the common law doctrine of *collateral* warranty altogether, since it makes the heirs responsible upon the ancestor's warranty only to the extent of assets descended from *him*, and not from *another* ancestor.⁸ Thus where a husband conveyed the land of his wife with warranty against the claims of himself and his heirs, and died, it was held that the children of the two parents, deriving title to the land from their *mother*, were not bound by the father's warranty.⁹

And even as to *lineal* warranty, the Virginia statute above quoted has affected two changes: (1) Whereas at common law, the *heir*, upon whom real assets have descended from the warrantor, is bound to make the warranty good in other land,¹⁰ he is now in Virginia, under the statute, bound to make it good to the extent of the *value* of the real assets descended from the warrantor, that is, he is bound *personally* but not *in rem*;¹¹ (2) In the second place, the lineal warranty at common law had the effect of *rebutting* the claims of the *heir* of the warrantor to the land conveyed, though he derives *no land* by descent from the warrantor, on the ground that if the heir should succeed in prosecuting his claim, he would then gain assets by descent (if he had them not before) and must then fulfill the warranty of his ancestor, and to permit the heirs' claim to be *rebutted* in the first instance avoids a *circuity of action*; but in Virginia, the statute declares that he shall be *barred* for the *value of what is descended* from the ancestor, so that, if nothing descends from him, he is not barred at all.¹²

§ 1115. Same—Effect of Ancient Warranty as to Compensation Made for Loss of Land by Title Paramount.

The warrantor himself is of course always bound to make

8. 2 Min. Insts. 712; *Norman v. Cunningham*, 5 Gratt. (Va.) 64, 77, 83.

9. *Urquhart v. Clarke*, 2 Rand. (Va.) 549.

10. 2 Min. Insts. 713; 2 Bl. Com. 302.

11. See *Norman v. Cunningham*, 5 Gratt. (Va.) 82, 83.

12. 2 Min. Insts. 711; 2 Bl. Com. 302; Va. Code, 1904, § 2419. (1208)

compensation when the land is lost by title paramount; but when he is dead, the liability of his *heir* to do so depends, at common law, first on the fact that *he is named* in the warranty: "*Hæredes mei*," says Lord Coke, "are words of necessity, for otherwise the heirs are not bound;"¹ and secondly, on his having *assets descended* to him from the warranting ancestor. This doctrine applies without discrimination to both lineal and collateral warranty.²

The obligation arising out of the warranty on the part of the warrantor and his heirs (supposing the latter to have assets by descent, and to the extent of such assets) is at common law to render for any part of the land warranted, lost by title paramount, its equivalent in value in other *lands*, having reference to the value at the time of the making of the warranty.³

In Virginia, it is enacted that "when the deed of the alienor mentions that he *and his heirs will warrant* what it purports to pass or assure, if any thing descends from him, his heirs shall be *barred* for the *value* of what is so descended or *liable* for such *value*." And this provision is understood to apply only to cases of *real assets descending* from the warranting ancestor, and not to *personal* assets, nor to assets, whether real or personal, accruing from him *by devise or bequest*.⁴

§ 1116. Same—Effect of Ancient Warranty in Rebutting or Estopping the Claims of Warrantor or His Heirs.

The claims of the warrantor cannot in general be asserted at common law in opposition to his own warranty, and the claim of his *heir* is at common law likewise repelled or rebutted by

1. 2 Th. Co. Lit. 250, n. (G); 2 Min. Insts. 709.

2. 2 Min. Insts. 709; 2 Bl. Com. 242, et seq., notes; 2 Th. Co. Lit. 186, n. (A).

3. 2 Min. Insts. 713; 2 Th. Co. Lit. 304, 308; 2 Bl. Com. 302; Va. Code, 1904, § 2419. This statute changes the form of compensation from other *lands*, as at common law, to the *value* (that is, in money) of the lands descended to the heirs; but it seems to work no change, where the alienor is still alive.

4. Ante, § 1114; 2 Min. Insts. 712; *Norman v. Cunningham*, 5 Gratt. (Va.) 77, 83.

the warranty of the ancestor, whether the heir actually derived any heritage from the warranting ancestor or not, and whether the warranty be lineal or collateral.¹

But in Virginia it is provided by statute that the heir of the warrantor shall be barred for the value of the real assets descended from the warranting ancestor, so that if no real assets or lands have descended from the warrantor, the heir's claim would not be liable to rebutter at all, nor would it be if the assets descended upon him came from *another ancestor* than the warrantor, thus doing away with the effects of *collateral warranty*.²

It is to be observed, that a covenant real of warranty, when annexed to an assurance by *feoffment, fine, or common recovery*, had not only the ordinary and personal effect of rebutting or repelling the grantor or his heirs from claiming the land, as by force of the estoppel of the deed, but also the much higher operation actually to *transfer and pass* to the grantee any estate in the land which the grantor may *afterwards have acquired*.³

But an after-acquired title, where the assurance is by *grant* or by *release*, or under the *statute of Uses*, is not actually *passed* by direct operation of law, however the grantor and his heirs under such assurances may be *estopped* to claim it.⁴

Where, however, the land is conveyed without any warranty at all, the grantor is in general not estopped to set up an after-acquired title, unless there be some claim or representation in

1. 2 Min. Insts. 709, 710 711.

2. Va. Code, 1904, § 2419; ante, § 1114.

3. Post, § 1348; 2 Min. Insts. 710; Rawle, Cov. Tit. 319, et seq.; 2 Th. Co. Lit. 353, n. (B, i), 456, 457; Sheppard's Touchst. 204, 210; Burtners v. Keran, 24 Gratt. (Va.) 66.

4. 2 Min. Insts. 710; Rawle, Cov. Tit. 320, 321; Bigelow, Estoppel, 337, 360, et seq.; Doe v. Oliver, 5 M. & R. 202, 2 Smith, Lead. Cas. 511, 514, et seq.; Doswell v. Buchanan, 3 Leigh (Va.) 365, 407, 23 Am. Dec. 280; Burtners v. Keran, 24 Gratt. (Va.) 66, 67; Gregory v. Peoples, 80 Va. 357; Reynolds v. Cook, 83 Va. 821, 3 S. E. 710; Townsend v. Outten, 95 Va. 536, 28 S. E. 958; Nye v. Lovitt, 92 Va. 710, 24 S. E. 345. See 5 Va. Law Reg. 51; post, § 1348, 1350.

(1210)

the conveyance that the grantor is seised of, or has full power to convey, the estate which the deed purports to convey.⁵

§ 1117. VIII. Personal Covenants in the Deed.

Covenants, as here used, are stipulations by either party, contained in a deed of conveyance, for the truth of certain facts, or to perform or give something to another. Thus, the grantor may covenant that he hath a right to convey; or for the grantee's quiet enjoyment, or the like; the grantee may covenant to pay the purchase money, or to pay rent, or to keep the premises in repair. Covenants in modern times supply the place of ancient warranty, and something more. Thus, they may oblige the grantor to be answerable for the goodness of the title he sells, but they may also relate to any other matter; and when they concern the title to the land sold, they have this great advantage over the ancient warranty, that they enable the grantee to charge with damages *in money* both the *personal and real estate* of the grantor, if there is a breach of the agreement; whereas the warranty can be redressed by the recovery of *lands only*.¹

In Virginia, however, if the warrantor be dead, and it is sought to make his *heir* liable for the breach of warranty, it is enacted that he is to be liable only for the *value* of the real assets *descended* upon him from the warrantor.²

§ 1118. Same—Personal Covenants Not Running with the Land.

Covenants which *do not run with the land* are such covenants as do not affect the nature, quality or value of the thing conveyed, independently of collateral circumstances, however they may affect the parties collaterally, in respect of other lands owned by them. The designation by which they are described, namely, that they *do not run with the land*, marks their most distinctive characteristic; that is, that they do not pass with the land to

5. Post, § 1350, et seq.; 2 Min. Insts. 710; *Nye v. Lovett*, 92 Va. 710, 24 S. E. 345; *Townsend v. Outten*, 95 Va. 536, 28 S. E. 958.

1. 2 Min. Insts. 714; 2 Bl. Com. 304.

2. Va. Code, 1904, § 2419. See ante, § 1114, et seq.

the assignee thereof, either to benefit or to charge him, notwithstanding *assigns* be specially mentioned.¹

Thus, where in a lease of land, with liberty to conduct a water-course through it, and to erect a silk mill, the lessee covenanted for himself, his executors, etc., and *assigns*, not to hire persons to work in the mill who were settled in other parishes, without a parish certificate, and afterwards *assigned the lease*, it was held that the covenant was not one that ran with the land, affecting neither its nature, quality, nor value, and that the *assignee* was not bound thereby.² So, a covenant to pay so much annually for the use of the poor does not run with the land;³ nor a covenant to build a house on *land other than that conveyed*; nor to pay a collateral sum of money (other than *rent*) to the grantor, or any money to a stranger; nor a covenant to return cattle or cattle of like value, leased with the premises.⁴

It is not enough, however, that the covenant concerns or affects the land conveyed; but in order to make it run with the land, there must be a *privity of estate* between the contracting parties. Hence, if mortgagor and mortgagee unite in a lease for years, and the lessee covenant with the *mortgagor* and his *assigns* to pay rent, and do repairs, and the *mortgagee* afterwards assign his interest, the assignee can maintain no action against the lessee, because, although the covenants relate to the land, yet there is no privity of estate between the mortgagee's assignee and the mortgagor with whom the lessee covenanted.⁵

For the most part, a covenant which relates to the land *runs with it*, and an assignee is liable to observe it, although assigns be not named; but as to this doctrine there seems at common law to be this exception, that if the covenant, although it concern the

1. Ante, § 413, et seq.; 421, et seq.; 2 Min. Insts. 715.

2. 2 Min. Insts. 715; *Mayor of Congleton v. Pattison*, 10 East 130.

3. *Mayho v. Buckhurst*, Cro. Jac. 438; 2 Min. Insts. 715.

4. 2 Min. Insts. 715; *Spencer's Case*, 5 Co. 16b, 1 Smith, Lead Cas. 92, 96, et seq.; Bac. Abr. Covenant (E), 3; Rawle, Cov. Tit. 281, et seq.

5. Ante, § 427; 2 Min. Insts. 715; *Webb v. Russell*, 3 T. R. 402, 403; *Stokes v. Russell*, 3 T. R. 678, 1 H. Bl. 563; *Roach v. Wadham*, 6 East 269.

(1212)

land, yet relates directly to a thing not then *in esse*, the covenant is not binding on an assignee unless expressly named. Thus, if in a lease the lessee covenants to *build a wall on the land*, and afterwards assigns, the assignee is under no obligation to erect the wall, unless the covenant were for the lessee *and his assigns*.⁶

But in Virginia, by statute, the words "the said ——— covenants" has the same effect as if *assigns were expressly mentioned*.⁷ The statute, however, gives *no greater effect* to the words, so that it does not convert covenants, which at common law would be *collateral* to the land even though assigns were mentioned, into covenants running with the land.⁸

§ 1119. Same—Personal Covenants Affecting Land Not Conveyed.

Occasionally cases arise wherein the owner of one tract of land agrees or covenants with the owner of an adjacent tract for the doing or not doing of certain acts upon his land, whereby the adjacent landowner will be benefited,—without the transfer or conveyance of any *land* between them. In such cases the question may present itself how far such covenants or agreements are enforceable by or against not only the original parties to the agreement, but by or against persons subsequently acquiring either tract of land.

Of course, the *original parties* to such a contract will have all the remedies for its breach, both at law and in equity, that would accrue upon the breach of any other contract.

But if we suppose either tract to be assigned to a third person, the question whether the covenant may be enforced by or against such *assignee* presents more difficulty.

Since the covenant does not run with the land (no land having been conveyed at the time the covenant was made), and since the assignee was not a party to the original covenant, it

6. Ante, § 421; 2 Min. Insts. 716; Bac. Abr. Covenant (E), 3; Spencer's Case, 5 Co. 156, 1 Smith Lead. Cas. 92, 96, et seq.

7. Va. Code, 1904, § 2445; 2 Min. Insts. 716.

8. Ante, § 421; 2 Min. Insts. 920.

would seem that upon common law principles he could neither sue nor be sued in a *court of law*, at least where the contract is *under seal*, for it is a principle of the common law that no person can sue upon a contract under seal, even though it be made *for his benefit*, unless he be a *party* thereto.¹

And while it is enacted in Virginia that "If a covenant or promise be made for the *sole benefit* of a person with whom it is not made, or with whom it is made jointly with others, such person may maintain in his own name any action thereon which he might maintain in case it had been *made with him only* and the consideration had moved from him to the party making such covenant or promise,"² yet this statute is of no application in the case we are considering, except perhaps where the original covenant is made for the *sole benefit* of prospective purchasers or assignees of the land, as where the tract is divided into lots to be sold, or where the covenant is intended to benefit the *land alone*, not the owner personally.³

But a *court of equity*, either upon the theory that the covenant creates a *trust* for the benefit of subsequent purchasers or assignees, or upon the theory that it creates an *easement*, will often enforce by injunction *restrictions upon the use* of the land agreed upon by the original parties, even though the land shall have come into the hands of subsequent purchasers.⁴

1. 2 Min. Insts. 451; *Ross v. Milne*, 12 Leigh (Va.) 204, 218, et seq., 37 Am. Dec. 646; *Tardy v. Creasy*, 81 Va. 553, 59 Am. Rep. 676. See *Sims*, Cov. 196; *Sugden*, Vend. (14th ed.) 581, et seq.; *Mygatt v. Coe*, 124, N. Y. 212, 147 N. Y. 456; *Hurd v. Curtis*, 19 Pick. (Mass.) 459; *Lyon v. Parker*, 45 Me. 471.

2. Va. Code, 1904, § 2415. See 3 Rob. Pr. (2d ed.) 14, et seq.; *Jones v. Thomas*, 21 Gratt. (Va.) 101; *Clemmitt v. N. Y. Ins. Co.*, 76 Va. 355.

3. See *Parker v. Nightingale*, 6 Allen (Mass.) 341, 83 Am. Dec. 632; *Sharp v. Ropes*, 110 Mass. 381; *Equitable Life Assur. Soc. v. Brennan*, 148 N. Y. 661. See, also, *Dickinson v. Hoopes*, 8 Gratt. (Va.) 353; *Tardy v. Creasy*, 81 Va. 553, 59 Am. Rep. 676.

4. Ante, § 534; 2 Min. Insts. 274; 2 *Tiffany*, Real Prop., § 348, et seq.; *Spicer v. Martin*, 14 App. Cas. 12; *Mander v. Falcke* [1891]. 2 Ch. 554; *London, etc., R. Co. v. Gomm*, 20 Ch. Div. 562; *Haywood v. (1214)*

The most usual instance of the application of these principles is the case of a division of a tract of land into lots and the sale thereof to independent purchasers, who all take subject to the same covenants touching the use of the property, the covenants being for the benefit of all the purchasers. The court of equity, at the instance of one or more of such purchasers will enjoin the violation of the covenant by another of the purchasers.⁵ And it seems to be immaterial whether the complainant has purchased his lot before or after the party who is guilty of violating the covenant.⁶

§ 1120. Same—Personal Covenants Running with the Land.

Covenants which *run with the land* are those which affect the nature, quality, or value of the thing conveyed, where there is *privity of estate* between the contracting parties, as a covenant to pay rent, to repair, to be answerable for the title, etc. Covenants of this description pass with the land, and are binding on, and in favor of, the assignee, although *assigns* be not expressly named; but it should be observed that the liability of the *assignee*

Brunswick, etc., Building Soc., 8 Q. B. Div. 403; Vanmeter v. Vanmeter, 3 Gratt. (Va.) 148; Crawford v. Patterson, 11 Gratt. 364; Pownal v. Taylor, 10 Leigh (Va.) 172; Supervisors v. Bedford High School, 92 Va. 295, 23 S. E. 299; Ladd v. Boston, 151 Mass. 585, 21 Am. St. Rep. 481; Hogan v. Barry, 143 Mass. 538; Chase v. Walker, 167 Mass. 293; Columbia College v. Lynch, 70 N. Y. 440; Muzzarelli v. Hulshizer, 163 Penn. St. 643; McMahon v. Williams, 79 Ala. 288; Clark v. McGee, 159 Ill. 518; Phoenix Ins. Co. v. Continental Ins. Co., 87 N. Y. 400; Post v. Weil, 115 N. Y. 361, 12 Am. St. Rep. 809.

5. 2 Tiffany, Real Prop., §§ 351, 352, et seq.; Spicer v. Martin, 14 App. Cas. 12; Collins v. Castle, 36 Ch. Div. 243; Parker v. Nightingale, 6 Allen (Mass.) 341, 83 Am. Dec. 632; Sharp v. Ropes, 110 Mass. 381; Hills v. Metzenroth, 173 Mass. 423; Clarke v. Martin, 49 Penn. St. 289; McMahon v. Williams, 79 Ala. 288; Hayes v. Waverly, etc., R. Co., 51 N. J. Eq. 345.

6. 2 Tiffany, Real Prop., § 352; Spicer v. Martin, 14 App. Cas. 12; Mackenzie v. Childers, 43 Ch. Div. 265; Parker v. Nightingale, 6 Allen (Mass.) 341, 83 Am. Dec. 632; DeGray v. Monmouth Club House Co., 50 N. J. Eq. 329; Tallmadge v. East River Bank, 26 N. Y. 105.

(1215)

is confined to the period of his occupancy, or at least of his interest in the land, whilst that of the *lessee* or *grantee himself* may continue indefinitely, being expressly undertaken.¹

It will be remembered that no covenant which has been *broken* is capable of being afterwards assigned *at law*. When, therefore, a covenant is violated, the suit must be brought by the party *at the time interested*, and not by one to whom the land may afterwards have come by assignment.² But like any other chose in action, the right to sue upon a broken covenant may be expressly assigned to another, whether he be the assignee of the land also or not, and though such assignee would obtain only an *equitable title* to the chose in action, he might, under the Virginia statute, sue thereon in a *court of law* in *his own name*.³

Omitting from present consideration covenants contained in *leases*, and confining our attention to deeds conveying the *fee simple* title, it may be well to observe that the courts are not at one with respect to the question whether the *burdens*, as well as the *benefits*, of covenants relating to the land, contained in a fee simple conveyance, are to be regarded as running with the land.

So far as the *benefits* of such covenants are concerned, it seems to be generally conceded that they pass with the land, and that subsequent purchasers of the land may sue if the covenant be violated.⁴

1. Ante, § 421; 2 Min. Insts. 716; Bac. Abr. Covenant (E), 3, 4; 2 Th. Co. Lit. 325, n. (G, 3); Rawle, Cov. Tit. 281, et seq.; Spencer's Case, 5 Co. 15b, 1 Smith, Lead. Cas. 92, 96, et seq.; Congleton v. Pattison, 10 East, 130; Mayho v. Buckhurst, Cro. Jac. 438.

2. Ante, § 423; 2 Min. Insts. 717; Dickinson v. Hoomes, 8 Gratt. (Va.) 353, 396; Marbury v. Thornton, 82 Va. 705, 1 S. E. 909; Washington City Sav. Bank v. Thornton, 83 Va. 164, 2 S. E. 193. See 7 Va. Law Reg. 67.

3. Va. Code, 1904, § 2860; ante, § 423.

4. 2 Tiffany, Real Prop., § 343; Sims, Cov. 136; Raby v. Reeves, 112 N. C. 688; Gaines v. Poor, 3 Met. (Ky.) 503, 79 Am. Dec. 559; National Bank of Dover v. Segur, 39 N. J. L. 173; St. Louis, I. M., etc., R. Co. v. O'Baugh, 49 Ark. 418; Peden v. Chicago, etc., R. Co., 73 Ia. 328, 5 Am. St. Rep. 680.

(1216)

But the main question relates to the passing of the *burdens* of such covenants. In England, it appears to be established that they do not run with the land so as to make subsequent purchasers thereof bound to perform them, upon the very reasonable ground that thus perpetual restrictions upon the use of land might be imposed at the caprice of individuals, and the land thus come to future generations hampered and trammelled.⁵ And this seems also to be the view in Virginia.⁶ It is otherwise, however, *in equity*, if the covenant creates a *servitude* or *easement*, or if it can be regarded as a *trust*, as has been shown.⁷

5. 2 Tiffany, Real. Prop., § 344; Clark, Cont. 549; Brewster v. Kidgile, 12 Mod. 166; Brewster v. Kitchin, 1 Ld. Raym. 317; Austerberry v. Oldham, 29 Ch. Div. 750. In Keppell v. Bailey, 2 My. & K. 517, Lord Brougham says: "It must not be supposed that incidents of a novel kind can be devised and attached to property at the fancy and caprice of any owner, * * * Great detriment would arise and much confusion of rights, if parties were allowed to invent new modes of holding and enjoying real property, and to impress upon their lands and tenements a peculiar character which should follow them into all hands, however remote."

6. Tardy v. Creasy, 81 Va. 553, 59 Am. Rep. 676. But see Supervisors v. Bedford High School, 92 Va. 295, 23 S. E. 299, where the court seems to consider the Virginia doctrine as unsettled. Other cases taking the English view are W. Va. Transp. Co. v. Pipe Line Co., 22 W. Va. 600, 46 Am. Rep. 527; Weld v. Nichols, 17 Pick. (Mass.) 538; Martin v. Drinan, 128 Mass. 515; Parrish v. Whitney, 3 Gray (Mass.) 516; Kennedy v. Owen, 136 Mass. 199; Lincoln v. Burrage, 177 Mass. 378; Scott v. McMillan, 76 N. Y. 141; National Bank of Dover v. Segur, 39 N. J. L. 184; Costigan v. Pennsylvania R. Co., 54 N. J. L. 233; Blount v. Harvey, 6 Jones (N. C.) 186; Hartung v. Witte, 59 Wis. 285. Some of the cases taking the opposite view are Gilmer v. Mobile, etc., R. Co., 79 Ala. 569; Georgia Southern R. Co. v. Reeves, 64 Ga. 492; Fitch v. Johnson, 104 Ill. 111; Conduit v. Ross, 102 Ind. 166; Hazlett v. Sinclair, 76 Ind. 488, 40 Am. Rep. 254; Sutton v. Head, 86 Ky. 156; Hickey v. Lake, etc., R. Co., 51 Ohio St. 40; Huston v. Cincinnati & Z. R. Co., 21 Ohio St. 236; Dexter v. Beard, 130 N. Y. 549; St. Andrew's Church's Appeal, 67 Penn. St. 512; Electric City Land, etc., Co. v. Coal Co., 187 Penn. St. 500; Crawford v. Withersbee, 77 Wis. 419.

7. Ante, § 1119, and authorities cited in notes 4, 5, 6. See Supervisors v. Bedford High School, 92 Va. 295, 23 S. E. 299.

(1217)

The most important by far of covenants in fee simple conveyances, which run with the land, are those which relate to the *title* (generally designated "covenants of title"), and the subject will be developed especially with reference to them in the succeeding sections.

§ 1121. Same—Personal Covenants of Title—Implied Covenants of Title.

Upon the conveyance of a *fee simple* or other *entire interest* of the grantor (leaving no reversion in him), covenants of title are never implied, though they are sometimes implied in *leases*.¹ In the former case, if the grantee has taken no *express* covenants of title, he is, in the absence of fraud or mutual mistake, without redress, if evicted under title paramount.²

§ 1122. Same—Express Covenants of Title—Enumeration.

The covenants of title, usual in England in the case of conveyances of the *fee simple*, and therefore generally designated "*English covenants of title*," and which are gradually gaining ground in Virginia, cover very thoroughly all the points that the experience of ages has taught are likely to arise to endanger the grantee's title to the land conveyed. As originally devised and used in England, they were expressed in terms of wearisome verbosity, an objection which however has now been happily obviated in Virginia by statute in imitation of 8 & 9 Vict., cc. 119, 124.¹

The English covenants are in substance as follows: (1) That the grantor is *seised* in fee simple of the land; (2) That the grantor has good right and lawful power to convey the land in fee simple; (3) That the grantee, his heirs and assigns, shall

1. Ante, § 414; 2 Min. Insts. 717; 2 Lom. Dig. 320, 321, 329.

2. 2 Min. Insts. 717; 2 Lom. Dig. 366, 367; Rawle, Cov. Tit. 353, et seq.; Williams v. Burrell, 1 C. B. 429, et seq.; Sutton v. Sutton, 7 Gratt. (Va.) 234, 56 Am. Dec. 109.

1. Va. Code, 1904, § 2445, et seq.; 2 Min. Insts. 717; post, § 1124, et seq.
(1218)

have *quiet possession*, and shall hold and enjoy the premises granted without eviction or disturbance; (4) That the land granted is *free from incumbrances*; and (5) That the grantor and his heirs shall execute all such *further assurances of title* to the land as shall be reasonably required by the grantee, his heirs or assigns.²

In addition to, or rather, in perhaps the majority of cases in Virginia unfortunately, in the place of, these English covenants of title, there are also the covenants of *general* and *special warranty*, the covenant of general warranty being practically equivalent to the third English covenant above enumerated and the special warranty being even more restricted.³

These various covenants of title we shall now examine in their order.

§ 1123. Same—1. Covenant of Seisin.

The first of the English covenants of title, namely, that the grantor is seised in fee simple of the land he purports to convey, is known as the *covenant of seisin*.

According to the better view, the term "*seised*," as used in this covenant, means such seisin (including *constructive seisin*)¹ as may now be had under the statutes of Uses, Wills and Grants, and applies only to seisin under a *lawful* claim of right and not, as at common law, to the possession of a *disseisor*, who is at common law none the less *seised*, though his title be unlawful.²

2. 2 Min. Insts. 717, 718; 2 Lom. Dig. 343; 2 Th. Co. Lit. 325, n. (G, 3); Rawle, Cov. Tit. 35, et seq.; 101, et seq.; 105, et seq.; 145, et seq.; 164, et seq.; Building, L. & W. Co. v. Fray, 96 Va. 559, 32 S. E. 58.

3. Post, § 1128, et seq.

1. Ante, §§ 141, 1041.

2. There are a few cases which take the latter view, and hold that the covenant of seisin is not broken if the grantor be actually in possession of the freehold, though his claim be *unlawful*, since he is, under the common law interpretation of the term, "*seised*." Raymond v. Raymond, 10 Cush. (Mass.) 134; Marston v. Hobbs, 2 Mass. 439. 3 Am. Dec. 61; Wilson v. Widenham, 51 Me. 566; Backers v. McCoy, 3 Ohio, 211, 17 Am. Dec. 585; Wetzell v. Richcreek, 53 Ohio St. 62.

In accordance with this view, the covenant amounts to an undertaking or representation that the grantor has the estate, in quantity and quality, which he purports to convey.³

But the covenant is not broken by the existence of liens and incumbrances on the land, or of rights of user therein, which do not amount to giving the *seisin* of the land to another, as in the case of inchoate dower, vendor's, mechanics' or judgment liens, etc.⁴ It would be otherwise, however, as to dower consummate (at least, *after assignment*), or where others own an interest in common with the grantor.⁵

The covenant of seisin is broken, if at all, *as soon as it is made*, but the damages therefor are not necessarily the *consideration* paid, but are to be measured by the actual loss sustained, so that if the covenantor, before any injury results, corrects the defect in the title, the recovery for the breach of the covenant will be limited to *nominal damages* only.⁶

It may be observed in conclusion that since this covenant is broken, if at all, as soon as made, the grantor is not responsible under it to any *assignee* of the grantee, but only to the *grantee* himself, *broken* covenants not running with the land.⁷

§ 1124. Same—2. Covenant of Right and Power to Convey in Fee Simple.

In order to simplify the verbiage of this covenant, and make

3. 2 Tiffany, Real. Prop., § 395; *Greenby v. Wilcocks*, 2 Johns (N. Y.) 1, 3 Am. Dec. 379; *Woods v. North*, 6 Humph. (Tenn.) 309, 44 Am. Dec. 312; *Pringle v. Witten*, 1 Bay (S. C.) 256, 1 Am. Dec. 612; *Lockwood v. Sturdevant*, 6 Conn. 385; *Parker v. Brown*, 15 N. H. 186. See *Building, L. & W. Co. v. Fray*, 96 Va. 559, 32 S. E. 58.

4. *Building, L. & W. Co. v. Fray*, 96 Va. 559, 32 S. E. 58; *Sedgwick v. Hollenback*, 7 Johns (N. Y.) 376; *Fitzhugh v. Croghan*, 2 J. J. Marsh. (Ky.) 429, 19 Am. Dec. 139; *Whitbeck v. Cook*, 15 Johns. 483, 8 Am. Dec. 272; *Moore v. Johnston*, 87 Ala. 220; *Kellogg v. Malin*, 50 Mo. 496, 11 Am. Rep. 426.

5. *Sedgwick v. Hollenback*, 7 Johns (N. Y.) 376; *Downer v. Smith*, 38 Vt. 464.

6. *Building, L. & W. Co. v. Fray*, 96 Va. 559, 32 S. E. 58.

7. Ante, § 1120.

(1220)

it better adapted for ordinary use, it is enacted in Virginia that a covenant by the grantor, in a deed for land, "that he has the right to convey the said land to the grantee," shall have the same effect as if the grantor had covenanted that he has good right, full power, and absolute authority to convey said land, with all the buildings thereon, and the privileges and appurtenances thereto belonging, unto the grantee, in the manner in which the same is conveyed or intended to be conveyed by the deed, and according to its true intent.¹

The covenant of right and power to convey is for the most part equivalent to the covenant of seisin;² but cases may arise wherein there may be a *right* or *power to convey* in fee simple, without any *seisin* in the grantor at all, as where the conveyance is made under a *power of appointment*. In such case, the covenant of seisin would not be appropriate.³

§ 1125. Same—3. Covenant for Quiet Enjoyment.

In pursuance of the policy, already described, of abbreviating the wording of these covenants, it is enacted in Virginia that a covenant by a grantor of land that "the grantee shall have quiet possession of the said land," shall have as much effect as if he covenanted that the grantee, his heirs and assigns, might, at any and all times thereafter, peaceably and quietly enter upon, and have, hold, and enjoy the land conveyed by the deed, or intended so to be, with all the buildings thereon, and the privileges and appurtenances thereto belonging, and receive and take the rents and profits thereof, to and for his and their use and benefit, without any eviction, interruption, suit, claim, or demand whatever.¹

This covenant is practically identical in effect with the covenant of *general warranty*, so customary in Virginia, and its

1. Va. Code, 1904, § 2449; 2 Min. Insts. 720.

2. Building, L. & W. Co. v. Fray, 96 Va. 559, 32 S. E. 58; Peters v. Bowman, 98 U. S. 56; Baldwin v. Timmins, 3 Gray (Mass.) 302.

3. 2 Tiffany, Real Prop., § 396. See Devore v. Sunderland, 17 Ohio, 52, 49 Am. Dec. 442; State v. Rawson, 6 Met. (Mass.) 439.

1. Va. Code, 1904, § 2450; 2 Min. Insts. 720, 721.

meaning and effect will be set forth in connection with the discussion of that covenant.²

§ 1126. Same—4. Covenant against Incumbrances.

Here again, the Virginia statute facilitates the use of this covenant by declaring that in case of a covenant that the grantee shall have quiet possession, etc. "*free from all incumbrances,*" these words shall have the same effect as the words, "and that [the grantee shall be] freely and absolutely acquitted, exonerated, and forever discharged, or otherwise by the said grantor or his heirs saved harmless, and indemnified of, from and against any and every charge and incumbrance whatever."¹

And a covenant by any such grantor, "that he has done no act to incumber the said lands," shall have the same effect as if he covenanted that he had not done or executed, or *knowingly suffered*, any act, deed, or thing whereby the lands and premises conveyed, or any part thereof, are, or will be charged, affected or incumbered.²

The distinction between these two forms of the covenant is obvious. In the first case, the grantor guarantees that there are no incumbrances upon the land, or at least that no harm shall come to the grantee by reason of any incumbrances existing at the time of the conveyance, whether placed upon the land by himself or by some former owner. In the second, he merely guarantees that *he* has not placed nor *knowingly suffered* to be placed any incumbrances or charge upon the land.

An *incumbrance*, as here used, is any right to or interest in the land, or the right to *charge*, *subject*, or *use* the same, subsisting in third persons, to the diminution of the value of the land, but consistent with a transfer of the fee simple to the grantee.³ Thus, any *lien*, whether it be a mortgage, a judgment

2. Post, § 1128, et seq.

1. Va. Code, 1904, § 2450; 2 Min. Insts. 721.

2. Va. Code, 1904, § 2452; 2 Min. Insts. 721.

3. 2 Tiffany, Real Prop., § 397; Prescott v. Trueman, 4 Mass. 630, 3 Am. Dec. 246; Huyck v. Andrews, 113 N. Y. 81, 10 Am. St. Rep. 432; Lafferty v. Milligan, 165 Penn. St. 534; Kelsey v. Remer, 43 Conn. 129, 21 Am. Rep. 638.

(1222)

or attachment lien, a lien for taxes, a vendor's or mechanics' lien, etc., is embraced by the covenant.⁴

The covenant also affords protection to the purchaser against *private easements*, such as a right of way, or a right to maintain a drain, etc., of which he has no notice, but not against a *public highway*.⁵ But an easement created by the conveyance of a *quasi servient* tenement is not within the protection of the covenant, nor is the creation of such an easement affected by the fact that the conveyance of such *quasi servient* estate contains a covenant against incumbrances.⁶

So also, a *natural easement*, such as the right of support of land by adjacent or subjacent land, or the right to the uninterrupted flow of a stream is not within the scope of the covenant, and is not to be regarded as an incumbrance.⁷

But the existence of a right of *dower*, whether inchoate or consummate, is a violation of the covenant against incumbrances,—at least, if the dower be not already assigned.⁸ In the latter case, it would seem to be rather a violation of the cove-

4. 2 Tiffany, Real Prop., § 397; Wyman v. Ballard, 12 Mass. 304; Jenkins v. Hopkins, 8 Pick. (Mass.) 346; Norton v. Babcock, 2 Met. (Mass.) 510; Cockran v. Guild, 106 Mass. 29, 8 Am. Rep. 296; Hall v. Dean, 13 Johns. (N. Y.) 105; Funk v. Voneida, 11 S. & R. (Penn.) 109, 14 Am. Dec. 617; Thomas v. St. Paul's Church, 86 Ala. 138; Plowman v. Williams, 6 Lea (Tenn.) 268; Crowell v. Packard, 35 Ark. 348.

5. 2 Min. Insts. 721; 2 Tiffany, Real Prop., § 397; Jordan v. Eve, 31 Gratt. (Va.) 1; Scott v. Beutel, 23 Gratt. 1; Deacon v. Doyle, 75 Va. 261; Blake v. Everett, 1 Allen (Mass.) 248; Prescott v. White, 21 Pick. (Mass.) 341, 32 Am. Dec. 266; Wilson v. Cochran, 46 Penn. St. 233; Scriver v. Smith, 100 N. Y. 471, 53 Am. Rep. 224. See Trice v. Kayton, 84 Va. 217, 10 Am. St. Rep. 836, 4 S. E. 377.

6. 2 Tiffany, Real Prop., § 397; Harwood v. Benton, 32 Vt. 724; Dunklee v. Wilton R. Co., 24 N. H. 489.

7. 2 Tiffany, Real Prop., § 397; Prescott v. Williams, 5 Met. (Mass.) 429.

8. Ficklin v. Rixey, 89 Va. 832, 37 Am. St. Rep. 891, 17 S. E. 325; Porter v. Noyes, 2 Me. 22, 11 Am. Dec. 30; Bigelow v. Hubbard, 97 Mass. 195; Barnett v. Gaines, 8 Ala. 373; Walker v. Deaver, 79 Mo. 664; Carter v. Denman, 23 N. J. L. 260.

nant of seisin or of right and power to convey.⁹

In order that the grantor may be held responsible upon his covenant against incumbrances, it is not enough to establish merely that an incumbrance exists. It is also essential that the incumbrance shall not have been recognized by the parties in advance as being outside the scope of the covenant. Thus, it has been held in Virginia that the covenant to pass title "free from incumbrance" is not broken by the existence of a *deed of trust* upon the land conveyed, where the grantee has not paid the purchase money, the deed of trust itself providing that the lien thereof shall be *released pro tanto* upon the receipt of the purchase money for any portion of the land sold.¹⁰

Whether the incumbrance is one not intended by the parties to be included within the covenant is a question of intention, to be established by reference to the conveyance as a whole, its subject matter, the relation of the parties to it and to each other, and the knowledge of the existence of the incumbrance on the part of the grantee.¹¹ Thus, if the grantee *assumes the payment* of a mortgage on the land, the existence of such mortgage is not a breach of the covenant against incumbrances, though not expressly excepted.¹²

But the fact that the grantee has *notice* of the incumbrance, while important as an evidence that the incumbrance was not intended to be within the scope of the covenant, is by no means *conclusive* upon that point, for it might well be that the grantee expected the grantor to clear it off before executing the deed, or out of the purchase money.¹³

9. Ante, § 1123; *Sedgwick v. Hollenback*, 7 Johns. (N. Y.) 376; *Downer v. Smith*, 38 Vt. 464.

10. *Anderson v. Creston Land Co.*, 96 Va. 257, 31 S. E. 82.

11. 2 *Tiffany*, Real Prop., § 397; *Rawle*, Cov. Tit. § 85; *Memmert v. McKeen*, 112 Penn. St. 315; *Janes v. Jenkins*, 34 Md. 1; *Kutz v. McCune*, 22 Wis. 628, 99 Am. Dec. 85; *Barre v. Fleming*, 29 W. Va. 314, 1 S. E. 731.

12. *Freeman v. Foster*, 55 Me. 508; *Watts v. Welman*, 2 N. H. 458.

13. *Rawle*, Cov. Title, § 88; *Funk v. Voneida*, 11 S. & R. (Penn.) 112, 14 Am. Dec. 617; *Huyck v. Andrews*, 113 N. Y. 81, 10 Am. St. Rep. 432; *Buck v. Hill*, 48 Ind. 52, 17 Am. Rep. 731; *Kellogg v. Malin*, (1224)

§ 1127. Same—5. Covenant for Further Assurance of Title.

The verbiage of this covenant also has been abbreviated in Virginia by statute, enacting that a covenant by a grantor "that he will execute such further assurances of the said lands as may be requisite," shall have the same effect as if he covenanted that he, the grantor, his heirs or personal representatives, will at any time, upon any *reasonable* request, at the charge of the grantee, his heirs or assigns, do, execute, or cause to be done or executed, all such further acts, deeds, and things, for the better, more perfectly and absolutely conveying and assuring the said lands and premises hereby conveyed, or intended so to be, unto the grantee, his heirs and assigns, in manner aforesaid, as by the grantee, his heirs or assigns, or his or their counsel in the law, shall be reasonably desired, advised, or required.¹

Under this covenant the grantee may only demand that his grantor do such further acts as may be *reasonably* necessary to perfect the title. He cannot demand nor expect that the grantor should do acts which are unnecessary, or impossible of performance; nor can he reject acts that constitute all that is reasonably necessary, merely because they are not satisfactory to him.²

Unlike the other covenants heretofore considered which, for the most part, *sound in damages*, the remedy for the breach of this covenant is more often a suit for *specific performance*, which constitutes it a valuable covenant for the grantee.³ But if the title turn out defective, the grantor may forestall any complaint by the grantee and, before the grantee has suffered any damage or been disturbed in his possession, may set up and supply a missing link in the chain of title, thus depriving the grantee of any legal basis upon which to found a suit for the breach of this covenant.⁴

50 Mo. 496, 11 Am. Rep. 426; *Grice v. Scarborough*, 2 Speers (S. C.) 649, 42 Am. Dec. 391.

1. Va. Code, 1904, § 2451; 2 Min. Insts. 721.

2. 2 Tiffany, Real Prop., § 399; Rawle, Cov., § 99, et seq.; *Gish v. Moomaw*, 89 Va. 376, 17 S. E. 324.

3. 2 Tiffany, Real Prop., § 399; Rawle, Cov., § 99, et seq.

4. *Building, L. & W. Co. v. Fray*, 96 Va. 559, 32 S. E. 58.

(1225)

§ 1128. Same—6. Covenant of Warranty—General and Special Warranty.

This is not one of the "*English covenants*," but is very popular in Virginia and in the South and West generally, and, indeed, in quite a large proportion of the deeds executed, is the only covenant used, notwithstanding the fact that it protects the grantee against a portion only of the defects covered by the English covenants.

The legislature has pursued the same policy of abbreviation in the case of the covenant of warranty as in the other cases previously considered, and has enacted that "A covenant by the grantor in a deed 'that he will *warrant generally* the property hereby conveyed,' shall have the same effect as if the grantor had covenanted that he, his heirs, and personal representatives will for ever warrant and defend the said property unto the grantee, his heirs, personal representatives and assigns, against the claims and demands of *all persons whomsoever*."¹

And "a covenant by any such grantor 'that he will *warrant specially* the property hereby conveyed,' shall have the same effect as if the grantor had covenanted that he, his heirs, and personal representatives, will for ever warrant and defend the said property unto the grantee, his heirs, personal representatives and assigns, against the claims and demands of *the grantor*, and all persons claiming *by, through, or under him*."²

Not content with this simplification of the covenants of general and special warranty, the legislature, as if to encourage still further the use of this at the expense of the superior English covenants, has further abbreviated and simplified them by enacting that "The words '*with general warranty*' in the *granting part* of any deed shall be deemed to be a covenant by the grantor 'that he will warrant generally (that is, against the claims of all persons), the property hereby conveyed.' The words '*with special warranty*' in the granting part of any deed shall be deemed to be a covenant by the grantor 'that he will warrant *specially*

1. Va. Code, 1904, § 2446; 2 Min. Insts. 920, 718, 719.

2. Va. Code, 1904, § 2447; 2 Min. Insts. 920, 719.

(1226)

(that is, against the claims of the grantor and his heirs and other designated persons), the property hereby conveyed.' ”³

§ 1129. Same—Application of Covenant of Special Warranty.

As may be seen from the description of the covenant of special warranty in the preceding section, it is much less of a protection to the grantee than the general warranty, for it protects him only against the claims or demands of the *grantor* or of those claiming or to claim *by, through or under him*.¹

Indeed, it is, for the most part, confined to deeds executed by persons in a *fiduciary* capacity, who are not making the conveyance for their own benefit, such as trustees, commissioners of the court, etc., though occasionally a deed is found, containing such a covenant, executed by the owner of the land himself to an ill-advised grantee.²

The covenant of warranty is generally considered the principal covenant in conveyances, and where the warranty is *special* and is followed or accompanied in the same sentence by other covenants in more general language, all the covenants will be regarded as *special* also, that is, as aimed only against the acts of the grantor himself or of those claiming by, through, or under him.³

§ 1130. Same—Application of Covenant of General Warranty.

The covenant of *general warranty* is broken if, at the time of the conveyance, the grantee finds the premises in possession of one claiming under a paramount title, without any other act on

3. Va. Code, 1904, § 2448; 2 Min. Insts. 921. A covenant that the grantee “shall have quiet possession of the premises, with covenants of special warranty” is a special, and not a general, warranty. *Campbell v. Watkins*, 105 Va. 824, 54 S. E. 989.

1. Va. Code, 1904, § 2447; ante, § 1128.

2. 2 Min. Insts. 718.

3. *Allemong v. Gray*, 92 Va. 216, 23 S. E. 298; *Campbell v. Watkins*, 105 Va. 827, 54 S. E. 989.

(1227)

the part of either the grantee or the claimant; such failure to get possession being regarded as tantamount to an *eviction*.¹

The general warranty is, in fact and in essence, substantially the same as a covenant for *quiet enjoyment*, and it is believed that no action lies upon it until *eviction*, or at least disturbance of the possession.² It is immaterial whether this eviction is the act of the grantor, or of a third person claiming under paramount title.³ Such eviction, however, need not be actual, but may sometimes be *constructive*, as where the covenantee is compelled *under decree of court* to purchase the adverse claim or to surrender the possession.⁴

But it is not broken by a tortious disturbance or even by an eviction by a mere *stranger* under no claim of title, since that is beyond the grantor's control, and the grantee has a legal remedy against the trespasser or disseisor.⁵ *A fortiori*, a mere *traspas*, there being *no eviction* either actual or constructive, is not a breach of the covenant, whether the trespasser be the grantor or a third person.⁶

1. 2 Min. Insts. 718; 2 Lom. Dig. 356; Rawle, Cov. 220, et seq.; Day v. Chisholm, 10 Wheat. 449; Woodford v. Pendleton, 1 Hen. & M. (Va.) 303; Sheffey v. Gardiner, 79 Va. 315, et seq.; Morgan v. Haley, 107 Va. 334, 58 S. E. 564; Banks v. Whitehead, 7 Ala. 83; Moore v. Vail, 17 Ill. 190; Grist v. Hodges, 3 Dev. (N. C.) 200.

2. 2 Min. Insts. 719; 2 Lom. Dig. 355; Rawle, Cov. 210, 211, et seq.; Findlay v. Toncray, 2 Rob. (Va.) 374, 379; Sheffey v. Gardiner, 79 Va. 315, et seq.; Morgan v. Haley, 107 Va. 334, 58 S. E. 564; Emerson v. Proprietors, etc., 1 Mass. 463; Kramer v. Carter, 136 Mass. 504; Copeland v. McAdory, 100 Ala. 553; Bostwick v. Williams, 36 Ill. 65, 85 Am. Dec. 385.

3. 2 Tiffany, Real Prop., § 398; Sedgwick v. Hollenback, 7 Johns. (N. Y.) 376; McGrew v. Harmon, 164 Penn. St. 115; Akerly v. Vilas, 23 Wis. 207, 99 Am. Dec. 165; Davis v. Smith, 5 Ga. 274, 48 Am. Dec. 279; Burrus v. Wilkinson, 31 Miss. 537.

4. Morgan v. Haley, 107 Va. 334, 335, 58 S. E. 564.

5. 2 Tiffany, Real Prop., § 398; Noonan v. Lee, 2 Black 499; Gardiner v. Keteltas, 3 Hill (N. Y.) 330; Chestnut v. Tyson, 105 Ala. 149; Hoppes v. Cheek, 21 Ark. 585.

6. 2 Tiffany, Real Prop., § 398; Crosse v. Young, 2 Show. 425; Claunch v. Allen, 12 Ala. 159; Avery v. Dougherty, 102 Ind. 443, 52 (1228)

And it will be observed that such a covenant as this can never be treated as a covenant *against incumbrances*, for that would be a departure from its terms, and would make it unavailable by an assignee of the grantee, for as to any prior incumbrance, it would be *broken at the instant of the execution* of the grantor's deed, and having thus become a mere right of action, would not pass by the grantee's assignment.⁷

§ 1131. Same—Liability of Remote Grantors upon Personal Covenants of Title.

There are certain of the covenants of title that are broken *as soon as made*, if broken at all; and these do *not run with the land*, since *broken* covenants cease immediately upon breach to pass with the land.¹ Such are the covenants of seisin, and of the right to convey,² and, it seems, the covenant against incumbrances also.³

But except in these cases, covenants of title run with the land, so that a remote assignee of the land may sue thereon when a breach occurs *in his time*; and this right is not affected by the fact that his immediate grantor has also given him covenants of title which are violated by the same eviction. He may

Am. Rep. 680. For the distinction between actual and constructive eviction, with illustrations, see ante, § 419.

7. 2 Min. Insts. 719; *Marbury v. Thornton*, 82 Va. 705, 1 S. E. 909; *Washington City Sav. Bank v. Thornton*, 83 Va. 164, 2 S. E. 193; *Grist v. Hodges*, 3 Dev. (N. C.) 200.

1. Ante, §§ 1123, 1124.

2. Ante, § 1123; *Building, L. & W. Co. v. Fray*, 96 Va. 559, 32 S. E. 58; *Mygatt v. Coe*, 124 N. Y. 212; *Greenby v. Wilcocks*, 2 Johns. (N. Y.) 1, 3 Am. Dec. 379; *Mitchell v. Warner*, 5 Conn. 498; *Chapman v. Holmes*, 10 N. J. L. 20; *Clement v. Bank of Rutland*, 61 Vt. 298; *Lawrence v. Montgomery*, 37 Cal. 188; *Ballard v. Child*, 34 Me. 355.

3. 2 Min. Insts. 719; 2 Tiffany, Real Prop. § 401; *Marbury v. Thornton*, 82 Va. 702, 1 S. E. 909; *Washington City Sav. Bank v. Thornton*, 83 Va. 164, 2 S. E. 193; *Clark v. Swift*, 3 Met. (Mass.) 390; *Mitchell v. Warner*, 5 Conn. 498; *Carter v. Denman*, 23 N. J. L. 260; *Lawrence v. Montgomery*, 37 Cal. 183; *Moore v. Merrill*, 17 N. H. 75, 43 Am. Dec. 593; *Logan v. Moulder*, 1 Ark. 313, 33 Am. Dec. 338; *Blondeau v. Sheridan*, 81 Mo. 545. See ante, § 1124.

(1229)

sue either.⁴ But no owner of the land, *after parting* therewith, may sue a prior grantor, until he has himself been *compelled to pay damages* on his own covenant, in favor of one claiming under him, this being regarded as equivalent to an *eviction*. But for this rule, several judgments might be recovered against a remote grantor for the same breach by successive owners of the land.⁵ And where one covenantor is thus sued upon his covenant by the party evicted and judgment recovered against him, in order that he may sue a prior covenantor for reimbursement, the burden is ordinarily upon him to prove in his action that the evictor had a valid title.⁶ But he may relieve himself of this burden, if, in the prior suit wherein judgment has been recovered against him, he should have notified the more remote covenantor of the pendency of such prior action and requested him to defend it.⁷

Neither the covenantee nor any subsequent owner of the land can in general, *after having parted* with the land, *release* the covenant, so as to deprive a subsequent owner of the land of his right to sue thereon; and, indeed, it is very questionable whether he can do so while he *still holds* the land, so far as concerns a subsequent purchaser *without notice* of such release.⁸

4. 2 Tiffany, Real Prop., § 401; Morgan v. Haley, 107 Va. 331, 58 S. E. 564; Rawle, Cov., § 216; Markland v. Crump, 18 N. C. 101, 27 Am. Dec. 230; Withy v. Mumford, 5 Cow. (N. Y.) 137.

5. 2 Tiffany, Real Prop., § 401; Rawle, Cov. § 216; Wheeler v. Sohier, 3 Cush. (Mass.) 222; Withy v. Mumford, 5 Cow. (N. Y.) 137; Markland v. Crump, 18 N. C. 94, 27 Am. Dec. 230; Booth v. Starr, 1 Conn. 244, 6 Am. Dec. 233; Redwine v. Brown, 10 Ga. 311; Chase v. Weston, 12 N. H. 413; Clement v. Bank of Rutland, 61 Vt. 298.

6. Morgan v. Haley, 107 Va. 336, 58 S. E. 564.

7. Morgan v. Haley, 107 Va. 336, 58 S. E. 564; Rawle, Cov., § 117, et seq.

8. 2 Tiffany, Real Prop., § 401; Abby v. Goodrich, 3 Day (Conn.) 433; Claycomb v. Munger, 51 Ill. 373; Crooker v. Jewell, 29 Me. 527; Chase v. Weston, 12 N. H. 413; Field v. Snell, 4 Cush. (Mass.) 504; Susquehanna, etc., R. & Coal Co. v. Quick, 61 Penn. St. 339. But see Littlefield v. Getchell, 32 Me. 392.

§ 1132. Same—Extent or Measure of Recovery upon Personal Covenants of Title.

Because of the danger of imposing a grievous burden upon the grantor, in case he should unwittingly convey a defective title, the courts of England and of Virginia also have persistently declined to measure the damages, upon a breach of covenant of title, by the value of the land lost as at the time of *eviction*, but have held that the proper measure of recovery is the value of the land at the time of the *warranty*, that is, at the time of the conveyance; and the best standard of such value is in general the *price agreed upon* at the time of the sale or so much thereof as has been paid (with interest from the date of the eviction and the legal and taxable costs expended in the action in which eviction occurs).¹ But *nominal* damages only will be recoverable if *no actual loss* has been sustained by reason of the breach of the covenant.²

It should be noted in this connection that if the grantee recovers judgment upon a breach of the *covenant of seisin* (and probably upon a covenant of power to convey also), the effect is to establish judicially that the grantor *is not seised* of the land conveyed (or has not the power to convey the same), the logical and legal conclusion from which seems to be that the grantor's deed to the grantee (wherein the covenant occurs) must be deemed to be *void*.³

In case of a breach of the covenant against incumbrances, the amount the grantee has been compelled to pay in order to satisfy the outstanding incumbrance, or the loss he has actually sus-

1. 2 Min. Insts. 726; *Threlkeld v. Fitzhugh*, 2 Leigh (Va.) 489; *Morgan v. Haley*, 107 Va. 337, 58 S. E. 564; *Conrad v. Effinger*, 87 Va. 59, 24 Am. St. Rep. 646; *Stuart v. Pennis*, 100 Va. 615, 616, 42 S. E. 667; *Building, L. & W. Co. v. Fray*, 96 Va. 559, 32 S. E. 58; *Norman v. Cunningham*, 5 Gratt. (Va.) 82, 83. The same measure of damages obtains in actions for breach of contract to convey land. *Stuart v. Pennis*, *supra*. See *Mecklem v. Blake*, 22 Wis. 495, 99 Am. Dec. 73, note.

2. *Building, L. & W. Co. v. Fray*, 96 Va. 559, 32 S. E. 58.

3. *Stinson v. Sumner*, 9 Mass. 143, 6 Am. Dec. 49.

tained by reason of the enforcement thereof, constitutes the measure of the recovery, provided it does not exceed the total amount of the consideration or purchase price for the land actually paid by him.⁴

The purchaser is also entitled to recover such amount of rents and profits as he is liable for to the adverse and paramount claimant. And when it does not appear what is the value of the rents and profits for which the purchaser is so responsible, interest upon the purchase money, or upon the value of the land, from the time that such responsibility for rents and profits accrued, is to be given in lieu of rents and profits. But the vendor is not answerable for the value of improvements put upon the premises by the vendee.⁵

In Virginia very elaborate provisions are made by statute for the adjustment of the value of permanent improvements as between the recoveror of lands and the recoveree, where the recoveree, believed his title to be good; so that the vendee's interests are not so seriously affected as they were formerly by the denial to him of the value of his improvements as against the vendor.⁶

§ 1133. Same—Effect of Personal Covenants of Title in Estopping Grantor to Set Up After-Acquired Title.

When land is conveyed without any covenants of title, the grantor is, in general, not estopped to set up a title which he has afterwards acquired.¹

On the other hand, a covenant of title does work an estoppel in such case, partly in order to avoid *circuity of action*, seeing

4. *Dimmick v. Lockwood*, 10 Wend. (N. Y.) 142; *Foote v. Burnet*, 10 Ohio 317, 36 Am. Dec. 90; *Guthrie v. Russell*, 46 Ia. 269, 26 Am. Rep. 135; *Collier v. Cowger*, 52 Ark. 322.

5. 2 Min. Insts. 726. See *Stout v. Jackson*, 2 Rand. (Va.) 132, 154; *Threlkeld v. Fitzhugh*, 2 Leigh (Va.) 451; *Thompson v. Guthrie*, 9 Leigh 101, 33 Am. Dec. 225.

6. Va. Code, 1904, § 2760, et seq.; 2 Min. Insts. 726; *Hurn v. Keller*, 79 Va. 415; *Effinger v. Hall*, 81 Va. 102, 103.

1. 2 Min. Insts. 710; cases cited *infra*, note, 2. See post, § 1350. (1232)

that, if the grantor were allowed to recover upon the after-acquired title, he would be immediately liable to the grantee upon his covenant of title to the extent of the value of the land; but also for another still more urgent reason, namely, that honesty and fair dealing forbid that one shall assert a right in opposition to his own averments and representations. Hence a grantor is estopped to set up a title which he has afterwards acquired, not only where there is a covenant of *general warranty*, but in any case where the deed of conveyance *recites or affirms*, expressly or impliedly, that the grantor is *seised of the estate* which the deed purports to convey, and upon the faith of which the bargain was made.²

A qualification of this doctrine, however, must be made, it seems, in the case of covenants, etc., contained in a married woman's conveyance of her equitable separate estate or where she unites with her husband to pass her contingent dower interest; for the statute, authorizing such conveyance, after declaring that when the husband and wife have signed a writing, etc., it shall operate to convey from the wife her right of dower and "pass from her and her representatives all right, title, and interest of whatever nature, which *at the date of such writing* she may have in any estate conveyed or embraced therein as effectually as if she were at the date an unmarried woman," goes on to provide as follows: "Such writing shall not operate *any further* upon the wife or her representatives by means of *any covenant or warranty* contained therein which is not made with reference to her separate estate as a source of credit."³ But

2. Post, § 1350; 2 Min. Insts. 710; *Rensselaer v. Kearney*, 11 How. 297; *Burtner v. Keran*, 24 Gratt. (Va.) 42; *Raines v. Walker*, 77 Va. 92; *Gregory v. Peoples*, 80 Va. 357; *Reynolds v. Cook*, 83 Va. 821, 3 S. E. 710; *Nye v. Lovitt*, 92 Va. 710, 24 S. E. 345; *Young v. Young*, 89 Va. 675, 23 L. R. A. 642, 17 S. E. 470; *Townsend v. Outten*, 95 Va. 536, 28 S. E. 958; *Flanary v. Kane*, 102 Va. 566, 46 S. E. 312, 681. See 5 Va. Law Reg. 51.

3. Va. Code, 1904, § 2502; *Augusta Nat. Bank v. Beard*, 100 Va. 687, 42 S. E. 694. See *Lewis v. Apperson*, 103 Va. 624, 106 Am. St. Rep. 903, 68 L. R. A. 867; *Land v. Shipp*, 98 Va. 284, 50 L. R. A. 560, 6 Va. Law Reg. 158; *Nye v. Lovitt*, 92 Va. 710, 24 S. E. 345.

with regard to the wife's *statutory* separate estate, the general doctrine seems to apply.⁴

But while, if the covenantor afterwards acquire title *on his own account* and *with his own means*, the title enures in general to the *covenantee*, yet if he buys *with another's money* or acquires the title merely as *trustee*, etc., this result does not follow, but the title enures to the benefit of him who has advanced the consideration, or *cestui que trust*, etc.⁵

§ 1134. IX. Conclusion of Deed.

This part of a deed in general includes an affirmation that the signatures and seals attached thereto are those of the parties stipulating, in some such form as the following: "Witness the signatures and seals of the parties."¹

This part of the deed also comprehends the *date*, which is not essential; so that though there be no date, or a false or impossible date, the deed is yet valid. The *true date* is the time when the deed is proved to have been *delivered* (being, indeed, only the rendering of the Latin phrase, *datum et deliberatum*), but *prima facie* it is the time named as the date. The time of acknowledgment, or other *authentication for registry*, sometimes determines, or at least assists in determining, the true date.²

§ 1135. X. Reading the Deed.

It is necessary to the validity of a deed, as of any other instrument, that the party executing the same should know, or should have a fair opportunity to know, its contents. The essential thing is to acquaint the grantor in the deed with its contents, and it is immaterial whether that be done by his reading the instrument for himself, or by its being read to him. In

4. Va. Code, 1904, § 2286a.

5. 2 Min. Insts. 710, 711; Gregory v. Peoples, 80 Va. 357, 358; Bank of U. S. v. Carrington, 7 Leigh (Va.) 566; Kane v. O'Connor, 78 Va. 80; Raines v. Walker, 77 Va. 95. See post, § 1350.

1. See post, § 1136.

2. 2 Min. Insts. 726, 727; 2 Bl. Com. 304; Bac. Abr. Lease (I). 1. See post, § 1142.

the latter case it must, of course, be *truly read*; and if mis-read as to any part, it is, as to so much at least, and doubtless as to all dependent thereon, merely *void*. But if correctly read, the fact that it was *misunderstood* does not affect the validity of the instrument.¹

§ 1136. XI. Sealing and Signing the Deed—1. Origin of the Seal.

The use of seals as marks of authenticity to letters and other writings is extremely ancient. We read of it among the Jews and Persians in the earliest records of history. And in the book of Jeremiah there is a remarkable instance, not only of an attestation by seal, but also of the other formalities usually attending a Jewish purchase.¹ In the civil or Roman law also, seals were the evidence of truth.²

But in the times of the Saxons, they were not much used in England. The Saxon method was, for such as could write, to subscribe their names, and whether they could write or not, to affix the sign of the *cross*; a custom which illiterate persons observe to this day, by signing a cross for their mark when unable to write their names; and this inability to write, and therefore making a cross in its stead, is honestly avowed by one of the Saxon kings at the end of his charters,—*propria manu, pro ignorantia literarum, signum sanctæ crucis expressi et subscripsi*. In like manner, and for the same insurmountable reason, the Normans, a brave but unlettered nation, upon their first settlement in France, used the practice of *sealing only*, without writing their names, which custom continued when learning made its way among them, though the reason had ceased; and was by them, upon the Conquest, introduced into England instead of the English method of parties writing their names, and signing with the sign of the cross. And in the reign of Edward I, every free-

1. 2 Min. Insts. 727; 2 Bl. Com. 304; 2 Lom. Dig. 28; Harrison v. Middleton, 11 Gratt. (Va.) 527.

1. 2 Min. Insts. 727; 1 Kings, ch. XXI; Daniel, ch. VI; Esther, ch. VIII; Jer. ch. XXXII.

2. 2 Min. Insts. 727.

man, and even such of the more substantial villeins as were fit to be put upon juries, had their distinct, particular seals.³

§ 1137. Same—2. Deed to Be Signed as Well as Sealed.

Sealing alone (without signing) was sufficient in England to authenticate a deed, until the statute 29 Car. II, c. 3, expressly directed *signing* in grants of land and some other kinds of deeds. But in Virginia we have not adopted, in our statute of Conveyances, a similar phraseology, and it seems, therefore, very questionable whether, as a *general* proposition, a deed which is *actually sealed* is with us required to be *signed* also.¹ But in case of a *married woman's conveyance* of her equitable separate estate or where she unites with her husband to release her contingent dower interest, it is expressly required that it shall be *signed* by both husband and wife.²

However, as it is customary to *sign*, as well as to *seal*, deeds of all kinds, it would be very imprudent to depart from the usage.³

§ 1138. Same—3. Nature of the Seal—Common Law Doctrine.

By the original common law a seal was universally defined, until recently, to be *an impression on wax*, or some other *tenacious material*. But of late imposing authorities make it at least possible that hereafter, by an act of court-made law, it will be held (contrary to the notorious fact), that, by the common law, a seal is an impression on any substance capable of receiving and retaining an impression, and, therefore, as well on the paper or

3. 2 Min. Insts. 727, 728; 2 Bl. Com. 305, 306; 2 Th. Co. Lit. 233.

1. 2 Min. Insts. 728; 2 Lom. Dig. 28. Signature would doubtless be required, however, in a deed to which a mere *scroll* is affixed by way of seal under the Virginia statute. Va. Code, 1904, §§ 5 (cl. 12), 2841; post, § 1139.

2. Va. Code, 1904, § 2502; 2 Min. Insts. 728. There is no express provision as to signing, in case of the wife's conveyance of her statutory separate estate. Va. Code, 1904, § 2286a.

3. 2 Min. Insts. 728.
(1236)

parchment itself, as on wax or wafer.¹

It was held at common law that the impression need not be *acknowledged* as a seal in the body of the instrument; and that whether a writing is sealed or not is to be proved by the fact *when it is produced*; while the question whether the impression appearing on the wax is the seal of *the party* is to be proved like any other fact; and furthermore, that several parties may seal *with one seal*, or acknowledge one impression as the seal of all.² But in Virginia, by another startling act of court-made law, it is held that an *actual seal* affixed to a deed must, independently of statute, be *acknowledged in the body of the instrument* in order to make it a good deed.³

A statement in the instrument that it is *sealed* does not suffice as a substitute for a seal.⁴

§ 1139. Same—Statutory Doctrine in Virginia as to Nature of a Seal.

As to instruments under *official or quasi official seals*, it is

1. 2 Min. Insts. 661, 728; 1 Min. Insts. 593; 1 Sugden, Powers, 282, 283, c. VI, § IV, 9; Bac. Abr. Obligation, (C); Reg. v. St. Paul's, 7 Q. B. 238, 239; Pillow v. Roberts, 13 How. 473, 474; Curtis v. Leavitt, 15 N. Y. 9; Bates v. Boston, etc., R. Co., 10 Allen (Mass.) 251; Haven v. Grand Junction R. Co., 13 Allen 337. See 5 Va. Law Reg. 331. See Va. Code, 1904, § 5 (cl. 12), as to official seals; post, § 1139.

2. 2 Min. Insts. 728, 729; 2 Lom. Dig. 28, et seq.; Bac. Abr. Obligation, (C); Com. Dig. Faits (A, 2); Goddard's Case, 2 Co. 5a; 1 Dyer 19a; Ld. Lovelace's Case, W. Jones, 268; Ball v. Dunsterville, 4 T. R. 313; Cooch v. Goodman, 2 Ad. & E. 598; Ball v. Taylor, 1 Car. & P. 417; Warren v. Lynch, 5 Johns. (N. Y.) 244; MacKay v. Bloodgood, 9 Johns. 285; Proprietors, etc. v. Hovey, 21 Pick. (Mass.) 417, 428; Devereux v. M'Mahon, 108 N. C. 134; Wing v. Chase, 35 Me. 260; Taylor v. Glaser, 2 S. & R. (Penn.) 502; Carter v. Chandron, 21 Ala. 88.

3. Bradley Salt Co. v. Norfolk, etc., Co., 95 Va. 461, 28 S. E. 567, 1 Va. Law Reg. 622. This was held in respect to a contract for the sale of *personalty*, but the decision would seem to be equally applicable to deeds of all sorts.

4. Taylor v. Glaser, 2 S. & R. (Penn.) 502; McPherson v. Reese, 58 Miss. 749; Deming v. Bullitt, 1 Blackf. (Ind.) 241; Davis v. Judd, 6 Wis. 85.

(1237)

enacted in Virginia that "in cases in which the seal of any corporation, court, or public office, shall be required to be affixed to any paper executed by a corporation, or issuing from such court or office, the word "seal" shall be construed to include an impression of such official seal made upon the parchment or paper alone, as well as an impression made by means of a *wafer* or of *wax* affixed thereto.¹

And in respect to *natural persons*, it is enacted that "any writing to which a natural person making it shall *affix a scroll by way of seal* shall be of the same force as if it were actually sealed."²

The statute, it will be observed, requires for its operation that the scroll be affixed *by way of seal*, which is construed to mean that the intention of the party must appear from the language of the deed itself or else by a necessary inference from the circumstances, as that, by statute, the instrument is of no effect unless under seal. In instruments not *required by some statute* to be under seal, the scroll must be recognized as a seal in the *body of the instrument*, as in case of a common bond for money;³ whilst in the instruments required *by statute* to be under seal (*e. g.*, conveyances of freeholds, etc.), it may perhaps suffice to have a solemn recognition of the scroll as a seal at the time the instrument is acknowledged or proved for registry; but extrinsic evidence is not otherwise admissible to prove that a scroll at the foot of a writing was affixed by way of *seal*.⁴

One scroll duly acknowledged by any number of parties, would appear upon principle to be the *seal of all*, as where the instru-

1. Va. Code, 1904, § 5 (cl. 12), 2841.

2. Va. Code, 1904, § 5 (cl. 12), 2841; 2 Min. Insts. 729.

3. 2 Min. Insts. 729; Clegg v. Lemessurier, 15 Gratt. (Va.) 108; Gover v. Chamberlain, 83 Va. 286, 5 S. E. 174. A paper concluding "Witness my hand *and seal*," but to which no seal nor scroll by way of seal is attached, is not a sealed instrument, and is ineffectual to convey land. A seal or scroll affixed *after delivery* is not sufficient. Burnette v. Young, 107 Va. 184, 57 S. E. 641.

4. 2 Min. Insts. 729; 2 Lom. Dig. 30; Parks v. Hewlett, 9 Leigh (Va.) 511; Ashwell v. Ayers, 4 Gratt. (Va.) 283; Clegg v. Lemessurier, 15 Gratt. 108.

(1238)

ment concludes, "witness our *hands and seals*." If the corresponding proposition be true at common law, touching a common law seal, an *impression on wax*, etc., which may, and sometimes does, have a distinctive character, it seems to be *a fortiori*, proper as to *scrolls* as seals, which can have no character at all. Accordingly, the weight of American authority is in favor of the doctrine as above stated.⁵

What constitutes a scroll (or scrawl) is not clearly ascertained. A circle or rectangle of ink, with or without the word "seal" written in it, is certainly sufficient, and so is the word *seal* affixed to the signature without such circle or rectangle. So also are printed stamps.⁶

§ 1140. XII. Delivery of the Deed.

The next requisite of a valid deed is that it be *delivered* to the party himself or his agent. A deed takes effect only from this delivery; for if the date be false or impossible, the delivery ascertains the time of it. And if another person seals the deed, yet if the party deliver it himself, he thereby adopts the sealing, and by parity of reason the signing also, and makes them both his own.¹

The deed of a *corporation* needs *no delivery*, the affixing of the common seal giving perfection to it without any further ceremony; at least if it be done with that intent; for if the order to affix the seal be accompanied by a direction to the officer to retain the conveyance in his hands until certain conditions be complied with, the sealing does not amount to delivery.²

5. 2 Min. Insts. 729; *Bohannon v. Lewis*, 3 Mon. (Ky.) 377; *Bowman v. Robb*, 6 Penn. St. 302; *Yarborough v. Monday*, 2 Dev. (N. C.) 493, 3 Dev. 420; *Pequawkett Br. v. Mathes*, 7 N. H. 230, 26 Am. Dec. 737; *Hatch v. Crawford*, 2 Port. (Ala.) 54; *Davis v. Burton*, 3 Scam. (Ill.) 41, 36 Am. Dec. 512; *Witter v. McNeill*, 3 Scam. 436; *Mackay v. Bloodgood*, 9 Johns. (N. Y.) 286. But it should be observed that a contrary doctrine was *assumed* in Virginia, in *Rankin v. Roler*, 8 Gratt. 63, 67.

6. 2 Min. Insts. 730; *Buckner v. McKay*, 2 Leigh (Va.) 489; *Lewis v. Overby*, 28 Gratt. (Va.) 628.

1. 2 Min. Insts. 731; 2 Bl. Com. 307. See 1 Va. Law Reg. 383.

2. 2 Min. Insts. 731; 2 Lom. Dig. 33; *Angell & Ames, Corp.*, § 227.

(1239)

§ 1141. Same—Mode of Making Delivery.

The usual mode of making delivery of a deed is to take it up and say, "I deliver this as my act and deed." But it may be without words, or by mere words, without any act of delivery; as if the writing, sealed, be handed to the grantee, or whilst it lies upon the table, the feoffor says to the feoffee, "Take the writing; it is sufficient for you;" or, "Take it as my deed," or the like. Nor, indeed, is a formal delivery essential, if there be acts evidencing an *intention* to deliver. It is not even essential that the grantee should be present at the time, or the delivery be *personally* made to and accepted by him. And although there must be an acceptance of the deed (which is usually implied in the delivery), and presumed from the beneficial character of the transaction, supposing it be for the grantee's benefit, there is no necessity that the acceptance should take place immediately upon the delivery.¹

The deed need not be delivered to the grantee in person in order to be effectual. If delivered to a third person *unconditionally*, and without reserving the right to recall it or otherwise to control its use, with direction to deliver to the grantee *after the grantor's death*, or upon any certain future event, the delivery is effectual to pass title to the grantee, and the grantor cannot recall it.² In such case, a subsequent deed to another

1. 2 Min. Insts. 731; 2 Lom. Dig. 33; 2 Bl. Com. 306, n. (17); Shepard's Touchst. 57, et seq.; 4 Kent, Com. 454, et seq.; 2 Th. Co. Lit. 234, 235; Skipwith v. Cunningham, 8 Leigh (Va.) 271, 281, 31 Am. Dec. 642; Beale v. Seively, 8 Leigh 658; Hutchinson v. Rust, 2 Gratt. (Va.) 394; Schreckhise v. Wiseman, 102 Va. 9, 45 S. E. 745; Frank v. Frank, 100 Va. 627, 42 S. E. 666; Church v. Gilman, 15 Wend. (N. Y.) 656, 30 Am. Dec. 82, 89, note; Jones v. Jones, 6 Conn. 11, 16 Am. Dec. 39, note. See 6 Va. Law Reg. 798; Brown v. Westerfield, 47 Neb. 399, 53 Am. St. Rep. 537, note.

2. Schreckhise v. Wiseman, 102 Va. 9, 45 S. E. 745; Frank v. Frank, 100 Va. 627, 42 S. E. 666; Trask v. Trask, 90 Ia. 318, 48 Am. St. Rep. 446; White v. Pollock, 17 Mo. 467, 38 Am. Dec. 671; Berry v. Young, 98 Cal. 446; Wheelwright v. Wheelwright, 2 Mass. 454, 3 Am. Dec. 66; Brown v. Westerfield, 47 Neb. 399, 53 Am. St. Rep. 539, note. (1240)

grantee who has *full knowledge* of the facts is null and void as against the first grantee.³

One of the most striking cases illustrative of the proposition that there may be a valid delivery, notwithstanding the grantee is not present, and although the grantor never parts with the deed, is that of *Doe v. Knight*,⁴ where the grantor signed a deed (which was already sealed) in the presence of his niece, the grantee not being present, and said, "I deliver this as my act and deed;" whereupon she attested it, and then he took it away with him. Yet it was resolved to be a good delivery.⁵

But whilst a deed may be delivered, not only to the grantee himself, or to any stranger for his use, or declared to be delivered although the grantee be absent, yet if delivered to a stranger, or even to the grantee himself, without any declaration or other matter to show that it is for the use of the grantee, it is not a sufficient delivery.⁶ On the other hand, since delivery is a matter of *intention*, not of physical or manual transfer, it would seem that a *declaration to a third person* of an intention that the deed shall take effect would be quite as effective as a manual transfer to him, if it can be satisfactorily established.⁷

And whilst it is not indispensable that the grantee's acceptance should ensue *immediately*, and his subsequent assent relates back to the delivery, yet if there be no subsequent acceptance, or none before some other party acquires, for valuable consideration, by

3. *Schreckhise v. Wiseman*, 102 Va. 9, 45 S. E. 745.

4. 5 B. & Cr. 671.

5. 2 Min. Insts. 732. See 2 Lom. Dig. 33; *Hutchinson v. Rust*, 2 Gratt. (Va.) 394.

6. 2 Min. Insts. 732; 2 Lom. Dig. 34; *Sheppard's Touchst.* 57; *Mitchell v. Ryan*, 3 Ohio St. 377; *Jackson v. Phipps*, 12 Johns. (N. Y.) 418; *Merrills v. Swift*, 18 Conn. 257; *Braman v. Bingham*, 26 N. Y. 483; *Bovee v. Hinde*, 135 Ill. 137; *Devinell v. Bliss*, 58 Vt. 353.

7. 2 Tiffany, Real Prop., § 406; *Regan v. Howe*, 121 Mass. 424; *Moore v. Hazelton*, 9 Allen (Mass.) 102; *Vought v. Vought*, 50 N. J. Eq. 177; *Kane v. Mackin*, 9 Sm. & M. (Miss.) 387; *Ruskin v. Shields*, 11 Ga. 636, 56 Am. Dec. 436; *Diehl v. Emig*, 65 Penn. St. 320; *Linton v. Brown*, 20 Fed. 455.

conveyance of the grantor or otherwise, a right to the property or to charge it, the deed is ineffectual.⁸

§ 1142. Same—Proof of Delivery.

The delivery of the deed, like any other fact, may as well be inferred from circumstances, as proved by positive testimony. Thus, although the subscribing witnesses remember nothing of the delivery, nor even of the transaction itself, yet if they recognize their signatures to the attestation, and especially if they declare that they know what is necessary for the valid execution of such an instrument, and would not have attested it had they not supposed everything was regularly done as required by law, it justifies the conclusion, in the absence of any contrary testimony, that the delivery took place.¹

So, also, it seems that the *signing, sealing and acknowledgment* of a conveyance raises a presumption of delivery.² The presumption of delivery may also arise from the *registry* of the deed; which, where it takes place upon the acknowledgment of the grantor *before the court of registry*, or where it is accompanied by an intent thereby to make the instrument operative immediately, affords a *conclusive* proof of delivery, if the grantee afterwards assent to it.³

8. 2 Min. Insts. 732; 2 Lom. Dig. 35; *Com. v. Selden*, 5 Munf. (Va.) 160; *Skipwith v. Cunningham*, 8 Leigh (Va.) 271, 31 Am. Dec. 642; *Frank v. Frank*, 100 Va. 627, 42 S. E. 666; *Spencer v. Ford*, 1 Rob. (Va.) 648; *Walwyn v. Coutts*, 3 Meriv. 707, 3 Sim. 14; *Garrard v. Lord Lauderdale*, 3 Sim. 1; *Acton v. Woodgate*, 2 My. & K. 97; *Brown v. Westerfield*, 47 Neb. 399, 53 Am. St. Rep. 544, note.

1. 2 Min. Insts. 732; 2 Lom. Dig. 34, 35; *Currie v. Donald*, 2 Wash. (Va.) 58; *Clarke v. Dunnavant*, 10 Leigh (Va.) 13. See *Haynes v. Boylan*, 141 Ill. 400, 33 Am. St. Rep. 326, note; *Cazassa v. Cazassa*, 92 Tenn. 573, 36 Am. St. Rep. 112.

2. 2 Min. Insts. 733; *Hutchison v. Rust*, 2 Gratt. (Va.) 394; *Kille v. Ege*, 79 Penn. St. 15; *Diehl v. Emig*, 65 Penn. St. 320; *Brann v. Monroe*, 11 Ky. Law Rep. 324. But see *Boyd v. Slayback*, 63 Cal. 493; *Alexander v. DeKermel*, 81 Ky. 345.

3. 2 Min. Insts. 733; 2 Lom. Dig. 34; *Com. v. Selden*, 5 Munf. (Va.) 160; *Boody v. Davis*, 20 N. H. 140, 51 Am. Dec. 210; *Snider v. Lackenour*, 35 N. C. 360; *Kerr v. Birnie*, 25 Ark. 225; *Fenton v. Miller*, 94 Mich. 204.

(1242)

This distinction between acknowledgment in court, and acknowledgment before justices, notaries, etc., appears to depend on the fact that the former is a complete record immediately, and imports *absolutely* all that is needful to make the deed complete so far as the grantor's act goes; whilst the latter does not become a record until the deed is registered, and is no more than any other acknowledgment *in pais*, and so is susceptible of being controverted. Accordingly, if the deed be regularly recorded in pursuance of the grantor's acknowledgment before authorities in the country, it is believed to be, in Virginia, as conclusive proof of delivery, and as finally consummating the effect of the instrument when the grantee assents to it, as if it had been acknowledged in court.⁴

§ 1143. Same—Effect of Delivery.

It is a reasonable general maxim upon this subject, that where a deed has once been delivered with any effect, any subsequent delivery is *void*. And so also, when land has once been duly and legally conveyed, a second conveyance thereof from the same party to the same grantee, is inoperative to convey the land.¹ Hence, while a deed *voidable* (and not void), for infancy or duress, cannot afterwards be *redelivered validly*, the redelivery after the coverture ended of a married woman's sole deed (which is *absolutely void*), is effectual; because in the last case, the first delivery was null.²

4. 2 Min. Insts. 733. See *Skipwith v. Cunningham*, 8 Leigh (Va.) 271, 31 Am. Dec. 642; *Spencer v. Ford*, 1 Rob. (Va.) 648; *Hutchison v. Rust*, 2 Gratt. (Va.) 394. It seems, however, that in Massachusetts and New York, registration of a conveyance of itself proves nothing as to delivery. 2 Lom. Dig. 33; *Maynard v. Maynard*, 10 Mass. 456; *Harrison v. Phillips' Acad'y*, 13 Mass. 456; *Jackson v. Phipps*, 12 Johns. 418. But see *Scrugham v. Wood*, 15 Wend. (N. Y.) 545, 30 Am. Dec. 75.

1. 2 Min. Insts. 733; *Evans v. Spurgin*, 6 Gratt. (Va.) 108, 52 Am. Dec. 105; *Vaughan v. Moore*, 89 Va. 925, 17 S. E. 326.

2. 2 Min. Insts. 733; 2 Lom. Dig. 35; *Sheppard's Touchst.* 60. Of course this proposition is not true in Virginia as to a married woman's *statutory* separate estate. See Va. Code, 1904, § 2286a.

(1243)

And yet this principle is not to be extended to a case where, at the time of the second delivery, there are rights in the grantor which did not exist at the time of the first delivery. Thus, if the grantor has only a life estate when he delivers the deed the first time, and afterwards, by descent or purchase, acquires a fee simple, a second delivery (supposing the terms of the deed comprehensive enough to embrace the fee) would operate, it is said, to pass the inheritance.³

And so, it seems, in all cases where the second delivery can operate upon any interest not divested by the first, the second is not void, but effectual. Of this, several curious illustrations occur under our former statute providing that an absolute conveyance (not a deed of trust or mortgage), registered within eight months *from its date*, should have relation back to its date, and take effect as to *creditors*, etc., as if it had been then recorded. Under this enactment, it was repeatedly held that, after the lapse of the eight months, the deed might be redelivered before new witnesses, or re-acknowledged, and if recorded within eight months thereafter, it would have relation to such redelivery, as if the deed had then for the first time been executed. This conclusion was justified by the consideration that the estate, until registry, remained in the grantor, *as to creditors and purchasers*, so that as to them there was something after the lapse of the eight months for the second delivery to operate upon.⁴

§ 1144. Same—Conditional Delivery or Delivery in Escrow.

The delivery of a conveyance may be either absolute or con-

3. 2 Min. Insts. 734; *Roanes v. Archer*, 4 Leigh (Va.) 561.

4. 2 Min. Insts. 734; 2 Lom. Dig. 36; *Eppes v. Randolph*, 2 Call (Va.) 103, 151; *Roanes v. Archer*, 4 Leigh (Va.) 550, 565. The same principle would not apply under the existing statute, which allows the registry to take effect *by relation* only where the writing is admitted to record within ten days from the day of its being *acknowledged before and certified by*, a justice, notary, etc., instead of from *its date*. Va. Code, 1904, § 2467.

(1244)

ditiional. Of absolute delivery nothing particular needs to be said, for every delivery is presumed to be absolute, unless it appears to be conditional.¹

It is of the essence of a conditional delivery (or escrow) of a *scaled* instrument, *perfect on its face*, that it should be made, not to the grantee himself, nor to his known agent (for then it must perforce be *absolute* for the most part, and any *condition* annexed will be *void*);² but made *to a stranger*, to be delivered by him, as the deed of the grantor, when certain conditions are complied with. It is then styled an *escrow*, in respect to which Judge Lomax and Mr. Preston enumerate the following principles:

(1) The writing does not operate as a deed till the second delivery;

(2) The deed is of none effect until the conditions be performed, although the grantee obtain possession of it, or even though the person deputed to make the second delivery wrongfully turn it over to him;

(3) On the second delivery rightfully made, it takes effect by relation, in respect of title and right to the intermediate rents, from the original delivery.

(4) Supposing the conditions performed, and the deed delivered the second time, its effect is not impaired by the death of either or both of the parties, or by a supervening disability in

1. 2 Min. Insts. 734; *Currie v. Donald*, 2 Wash. (Va.) 58.

2. 2 Min. Insts. 734; *Miller v. Fletcher*, 27 Gratt. (Va.) 405, et seq.; 21 Am. Rep. 356; *Hicks v. Goode*, 12 Leigh (Va.) 491, 37 Am. Dec. 677; *Virginia Passenger, etc., Co. v. Patterson*, 104 Va. 189, 51 S. E. 157; *Blair v. Security Bank*, 103 Va. 762, 50 S. E. 262. But in the case of an *unsealed* instrument, such as a note (whether negotiable or not), it is always competent to show, as between the original parties, that the contract was delivered to the payee, or to any other person, *on condition* that it is not to take effect except in a given event, or upon a given condition, or was only to be used for a special purpose. *Blair v. Security Bank*, *supra*. And though it be *scaled*, if *imperfect on its face*, it may be *conditionally delivered* to the obligee or grantee himself. *Blair v. Security Bank*, *supra*.

the grantor, such as coverture of a *feme*, before the second delivery.³

As the escrow takes effect from the original delivery, if the grantor were then under disability, as of infancy, from which he is relieved before the second delivery, yet the deed operates nothing; but if at the first period there be a mere impediment connected with the situation of the property, and having no concern with his personal capacity to contract, and the impediment is removed prior to the second delivery, the deed is good. Thus, where a disseisee, being out of possession, makes at common law a lease for years, and delivers it to a stranger as an escrow, bidding him *enter on the land*, and there to deliver the writing to the lessee, as his deed, it is a good lease.⁴

The *mode* of delivering a deed as an escrow is not necessarily marked by any distinguishing peculiarity, further than suffices to show that the delivery is conditional, and not absolute; but in prudence, it is wise to observe substantially the apt and proper form of words, namely, "I deliver this to you *as an escrow*, to deliver to A as my deed, upon condition that he first pay you for me \$100;" or upon any condition then named. And that the delivery is *conditional*, ought to be noticed in the attestation.⁵

And whatever form of words be employed, care must be taken that the language shall signify that the instrument is delivered as the *grantor's writing of escrow*, and not *as his deed*; for in the latter case, although it is to be delivered to the grantee only on some future event, yet it is the *grantor's deed* immediately, and the third person is a trustee of it for the grantee; so that, if the grantee obtain the writing from the trustee before the event happens, it will avail him fully, at least in a court of law, and the grantor is put to his remedy against the trustee.⁶

3. 2 Min. Insts. 734, 735; 2 Lom. Dig. 37; 3 Preston, Abst. Tit. 73, et seq.; Sheppard's Touchst. 59; Butler v. Baker's Case, 3 Co. 35b; Blair v. Security Bank, 103 Va. 762, 50 S. E. 262.

4. 2 Min. Insts. 735; 2 Lom. Dig. 37, 38; Sheppard's Touchst. 59; Butler's & Baker's Case, 3 Co. 35b.

5. 2 Min. Insts. 735; 2 Lom. Dig. 38; Currie v. Donald, 2 Wash. (Va.) 58.

6. 2 Min. Insts. 735, 736; 2 Lom. Dig. 38, 39.
(1246)

It has been stated that, in general, the delivery of a deed as an *escrow* must be to a *stranger*, and not to the grantee; but it must now be observed that that proposition supposes the deed to be upon its face a complete contract, requiring nothing but delivery to perfect it, according to the intention of the parties.⁷ It does not, therefore, apply to any instrument which on its face imports that something more than delivery is needful to make it a complete and perfect contract according to the views of the parties. Hence, a bond purporting *on its face* to be the joint bond of B and J, which is signed and sealed by G, and by him delivered to the *obligee*, upon condition that J should execute it, or otherwise that it should be null as to G, is, notwithstanding the delivery to the obligee, an *escrow*; and J having failed to execute it, it is void as to G.⁸

§ 1145. XIII. Attestation of Deed by Witnesses or Acknowledgment Thereof by Grantor.

The attestation of the deed by witnesses is not at common law (nor generally by statute) essential to the *validity* of the deed, but only a proper and convenient method of establishing its genuineness and authenticity.¹

7. 2 Min. Insts. 736; Blair *v.* Security Bank, 103 Va. 762, 50 S. E. 262. See, also, cases cited *infra*, note 8.

8. 2 Min. Insts. 736; 2 Lom. Dig. 38; Hicks *v.* Goode, 12 Leigh (Va.) 479, 37 Am. Dec. 677; King *v.* Smith, 2 Leigh 157; Ward *v.* Churn, 18 Gratt. (Va.) 801, 98 Am. Dec. 749; Nash *v.* Fugate, 24 Gratt. 202, 18 Am. Rep. 640; Wendlinger *v.* Smith, 75 Va. 317, 40 Am. Rep. 727; Blair *v.* Security Bank, 103 Va. 762, 50 S. E. 262.

1. 2 Min. Insts. 736; 2 Lom. Dig. 39; 2 Bl. Com. 307, n. (18). But in the execution of a conveyance in pursuance of a *power of appointment*, witnesses may be indispensable, and are so if they are *required* by the power; for the terms of the power must be strictly observed in respect to all the formalities and circumstances prescribed. 2 Bl. Com. 307, n. (18); 2 Lom. Dig. 233; 1 Sugd. Pow. (3d Am. Ed.) 250; 2 Min. Insts. 736; post, §§ 1333, 1338. The witness need not actually see the deed executed. If the grantor acknowledge it to him as his deed, that is sufficient. 2 Min. Insts. 736; 2 Lom. Dig. 39; Parks *v.* Mears, 2 Bos. & P. 217.

(1247)

In Virginia, a deed may be as well *admitted to record* upon proof by *two* witnesses in the court of registry, or before the clerk thereof *in his office*, as upon the acknowledgment of the parties before the prescribed authorities; but it is not necessary that the witnesses should subscribe their names, as in the case of will.²

Where there are attesting witnesses to a deed, they must, in general, be produced to prove it, in pursuance of the familiar rule which requires the *best evidence* available to be employed; but where the attesting witness is dead, or otherwise not to be procured, the next best evidence is the *witnesses'* hand-writing; and if that be not capable of proof, the hand-writing of the grantor.³

A deed of conveyance, when produced in evidence, must generally be proved to be authentic before it can be read; but when it is very old (as thirty years or upwards) and possession has gone according to its provisions, or even though possession may not have continued so long as thirty years, if such account be given of the deed as may be reasonably expected under the circumstances of the case, there being no circumstance of suspicion about it, such as an erasure or alteration, it is allowed to be read without further proof of genuineness.⁴ If, however, it be not accompanied by possession, the deed is not admissible in evidence, without proof of execution.⁵

The *acknowledgment* of the grantor before certain functionaries designated in the statutes on the subject, which is used much more commonly than the attestation of witnesses for the establishment of the genuineness of the instrument, is not itself a part of the deed, but is appended at the end thereof, its absence

2. Va. Code, 1904, § 2500; post, § 1395; 2 Min. Insts. 736; Turner v. Stip, 1 Wash. (Va.) 319.

3. 2 Min. Insts. 736, 737; 2 Lom. Dig. 39; Gilliam v. Perkinson, 4 Rand. (Va.) 325; Raines v. Philips, 1 Leigh (Va.) 483.

4. 2 Min. Insts. 737; Greenleaf, Ev., § 21; Roberts v. Stanton, 2 Munf. (Va.) 129, 5 Am. Dec. 463; Caruthers v. Eldridge, 12 Gratt. (Va.) 670.

5. 2 Min. Insts. 737; 2 Lom. Dig. 39; Dishazer v. Maitland, 12 Leigh (Va.) 524.
(1248)

not affecting the validity of the deed *as between the parties*, but merely preventing its recordation (unless the deed be proved by two witnesses).⁶

Prudence therefore would dictate that, in the absence of two or more witnesses to the execution of the deed, the grantee require it to be *acknowledged* by the grantor before the proper functionary before he accepts it, since conditions might subsequently arise, such as the death of the grantor, etc., that might prevent him from ever being able to record his deed.

§ 1146. XIV. Registry of the Deed.

This is not required (though often advantageous) as *between the parties*, save in the two instances of a married woman's conveyance of property not her statutory separate estate and tax-deeds.¹ But it is required as to creditors of, and subsequent purchasers from, the grantor, it being provided that conveyances of land and contracts to convey the same, as well as mortgages, deeds of trust, etc., shall be void as to *creditors* and *subsequent purchasers* for value and without notice, except and until they are duly admitted to record.²

§ 1147. Description of Property Conveyed—In General.

It is obvious that, in order to pass any property, the deed or other instrument transferring the same must describe the property intended to be conveyed with sufficient accuracy to identify it. Otherwise, the conveyance is void for *vagueness and indefiniteness*.¹ And if the description be so vague and uncertain

6. Va. Code, 1904, §§ 2500, 2501; post, § 1393, et seq.

1. Va. Code, 1904, § 2502; *Building, L. & W. Co. v. Fray*, 96 Va. 559, 32 S. E. 58. As to tax-deeds, see Va. Code, 1904, § 661; post, § 1384.

2. Va. Code, 1904, § 2465; post, §§ 1401, 1402, et seq.

1. *George v. Bates*, 90 Va. 839, 20 S. E. 828; *United States v. King*, 3 How. 787; *Kea v. Robeson*, 5 Ired. Eq. (N. C.) 373; *Dickens v. Barnes*, 79 N. C. 490; *Westfall v. Cottrills*, 24 W. Va. 763; *Clark v. Chamberlain*, 112 Mass. 19; *Lumbard v. Aldrich*, 8 N. H. 31; *Wilson v. Inloes*, 6 Gill (Md.) 121; *Holme v. Strantman*, 35 Mo. 293; *Howard v. North*, 5 Tex. 290, 51 Am. Dec. 769.

as not to be *self-explanatory*, the burden rests upon those claiming under it to show by evidence *aliunde* to what it truly applies;² and in the absence of such evidence, that rule of construction is adopted which declares that ambiguous or doubtful language in a deed is to be construed most strongly against the *grantor*, and that the grantee shall have the benefit of such doubt or ambiguity, provided such construction does not work an injury to the rights of third persons.³

If this be true as between the parties, *a fortiori* is it true as to subsequent purchasers from the grantor for value and without notice. The registry of a deed containing too vague and indefinite a description of the property to identify it, is *no notice* to such purchasers.⁴ Indeed, cases may arise wherein the description, though it is not so vague and indefinite as to invalidate the deed as *between the parties* (as in case of a conveyance of "all one's real estate," etc.) may yet be too general to furnish *notice* to third persons, even though the deed is recorded, or though such persons have actual knowledge thereof.⁵

While a deed is always void if the description of the property conveyed be too vague and indefinite, it is not necessarily void, if the description be *false*, paradoxical as this may seem. For it is a well established rule for the construction of such instruments that if, after rejecting so much of the description as is false, enough remains to *identify* the thing described, the instrument is operative, the legal maxim being, "*Falsa demon-*

2. Merritt v. Bunting, 107 Va. 178, 57 S. E. 567; Peery v. Elliott, 101 Va. 709, 44 S. E. 919; Reusens v. Lawson, 91 Va. 235, 21 S. E. 347.

3. 2 Min. Insts. 1058; Clark v. Roller, 104 Va. 475, 51 S. E. 816; Carrington v. Goddin, 13 Gratt. (Va.) 587; Peery v. Elliott, 101 Va. 709, 44 S. E. 919.

4. Merritt v. Bunting, 107 Va. 178, 57 S. E. 567; Williamson v. Payne, 103 Va. 551, 49 S. E. 660; Hardaway v. Jones, 100 Va. 481, 41 S. E. 957; Virginia Iron, etc., Co. v. Crane's Nest Co., 102 Va. 405, 46 S. E. 393; Florance v. Morien, 98 Va. 26, 34 S. E. 890.

5. Post, § 1411; Mundy v. Vawter, 3 Gratt. (Va.) 545; Merritt v. Bunting, 107 Va. 178, 57 S. E. 567.

(1250)

stratio non nocet, cum de corpore constat."⁶

There are various methods of describing land in deeds of conveyance, and frequently the parties, not content with one form of description, seek to make the assurance doubly sure by resorting to several. In such cases, great caution should be observed to see that the different descriptions are not inconsistent with, or repugnant to, one another. If they are thus repugnant, one or the other of three consequences will result. Either the deed will (1) be made hopelessly vague and indefinite, and will therefore be *void altogether*;⁷ or (2) that description is adopted which is *most certain*, though it may not be the one really intended;⁸ or (3) that portion which is repugnant may be rejected altogether, and if a sufficient description remains to identify the property intended to be transferred, the deed will stand.⁹

§ 1148. Same—Various Methods of Describing Land in Conveyances—Enumeration.

Aside from the very dangerous and unsuitable method of describing the land conveyed in general terms, such as "the — estate," or "the — farm," or "the — mill," or such and such "woods" or "mountain lands," or "all my real estate," etc., which, even though they may suffice to pass the land intended, are obnoxious to the objection that they describe it by means of attributes more or less *transient and temporary*, and therefore liable to change with time, so that in the course of years the land conveyed may become increasingly difficult of identification,¹ the method of description most usually employed in convey-

6. 2 Min. Insts. 1063; Day v. Trigg, 1 P. Wms. 286; Doe v. Galloway, 5 B. & Ad. 43; Goodtitle v. Southern, 1 M. & S. 299; Boardman v. Lessees of Reed, 6 Pet. 345; Wooten v. Redd, 12 Gratt. (Va.) 196; State Sav. Bank v. Stewart, 93 Va. 447, 25 S. E. 543; Clark v. Hutzler, 96 Va. 73, 30 S. E. 469; Flanary v. Kane, 102 Va. 547, 46 S. E. 312, 681.

7. Cases cited *supra*, notes 1, 4.

8. Glenn v. Augusta Perpetual B. & L. Co., 99 Va. 695, 40 S. E. 25.

9. Clark v. Hutzler, 96 Va. 73, 30 S. E. 469.

1. See 2 Tiffany, Real Prop., § 387.

ances as furnishing lasting and permanent means of identifying the land are the following: (1) Description by government survey, though this does not exist in Virginia or the other older states; (2) Description by reference to a plat or map; (3) Description by monuments, courses and distances, or by metes and bounds; (4) Description of city lots by reference to streets and numbers; (5) Description by reference to prior conveyance; (6) Description by the quantity of land or the number of acres; (7) The effect of a deed in including buildings, privileges and appurtenances along with the land conveyed.

§ 1149. Same—I. Description by Government Survey.

In those newer states of the Union, which have been carved out of the public domains of the United States, it is customary to describe land conveyed in accordance with the system of "rectangular surveys" established long since by act of Congress.¹ Mr. Tiffany, in his excellent treatise on the law of Real Property, describes this system as follows:²

"By this system, the public lands are divided into '*townships*,' each six miles square, these being formed by lines running east and west, six miles apart, which are crossed at intervals of six miles by lines running north and south. Each township, thus including approximately thirty-six square miles, is divided into thirty-six rectangular portions, each one mile square, called a '*section*.' A section is the smallest subdivision of which the lines are actually run on the ground, but smaller subdivisions are recognized, there being the '*quarter-section*,' containing one hundred and sixty acres, formed by running lines at right angles from points on the section boundaries half way between the corners, and '*quarter quarter sections*' of forty acres each. The areas of the various divisions do not, however, always correspond exactly to the figures above given, owing to irregularities in the land and the convergence of the meridians, as one goes further north.

1. Rev. Stats., U. S., § 2395, et seq.

2. 2 Tiffany, Real Prop., § 388. See, also, Warvell, Abst. Tit. 138, et seq.
(1252)

"Each tier of townships, running north and south, is known as a '*range*,' and the range is described with reference to a line known as the '*principal meridian*;' while each tier of townships, running east and west, is described with reference to some parallel of latitude taken as a '*principal base line*.' Thus, a township is referred to as being a certain number north or south of a certain base line, and a certain number east or west of a certain meridian.

"The thirty-six sections in the township are numbered consecutively, beginning at the northeast corner and counting west therefrom, and then proceeding east on the tier of sections next below, and so on until section thirty-six is reached in the southeast corner.

"The quarter section or quarter quarter section is defined with reference to the section of which it forms a part, as when one conveys 'the southeast quarter of the northwest quarter of section ten in township thirty-five north, range five east.'"

§ 1150. Same—II. Description by Reference to Plat or Map.

A reference in the conveyance to a plat or map for the purpose of describing the land conveyed makes such plat or map in effect a part of the conveyance, and it may then be used to identify the land.¹ But in such case care should be taken to have the plat recorded along with the deed (unless it has already been recorded in connection with some prior deed), or else the means of identification of the property is liable to be lost or destroyed.

This method of description is quite usual in case of a large tract of land divided into smaller lots for purposes of sale, such lots being first carefully surveyed and then numbered upon the plat, and upon their transfer described either by *metes and bounds*, corresponding to the survey, or by their *number* upon

1. 2 Tiffany, Real Prop., § 389; Schwalm v. Beardsley, 106 Va. 407, 56 S. E. 135; Dury v. Cray, 10 Wall. 263; Birmingham v. Anderson, 48 Penn. St. 253; Nichols v. Furniture Co., 100 Mich. 230; Sears v. King, 91 Ga. 577; Sanders v. Ransom, 37 Fla. 457.

the plat or map, or both.²

In Virginia, as in some of the other states, special statutory provision is made for the *recording of plats*, in certain cases of *city and suburban property* divided into lots for sale. The statute not only confers the privilege but imposes the duty upon the proprietors of such property, who "have heretofore subdivided or shall hereafter subdivide the same into *three or more parts* for the purpose of laying out a town or city or any addition thereto or any part thereof or suburban lots," to cause an accurate plat of such subdivision with references to known or permanent monuments to be made, giving the dimensions and length and breadth thereof, and the breadth and courses of all the streets and alleys established therein.³

The statute further provides that "Descriptions of lots or parcels of land in such subdivisions, according to the number and designation thereof on said plat, contained in conveyances or for the purpose of taxation, and copies of such plats or extracts therefrom, properly attested by the clerk in whose office said plats are recorded, shall have the same force and effect as evidence that copies of deeds now have,⁴ and shall be deemed good and valid for all intents and purposes."⁵

The statute then goes on to provide, how the plat shall be authenticated; with respect to the effect of the plat, when acknowledged and recorded, in passing public easements in the streets, alleys, parks, etc., and in passing title to such lots as are therein dedicated to charitable, religious or educational purposes; and with respect to the vacating and annulling of such plat, in whole or in part.⁶

§ 1151. Same—III. Description by Monuments, Courses and Distances, or by Metes and Bounds.

In those older states, which have not the advantage of the

2. See 2 Tiffany, Real Prop., § 389.

3. Va. Code, 1904, § 2510a.

4. See post, § 1401.

5. Va. Code, 1904, § 2510a.

6. Va. Code, 1904, § 2510a. See *Oney v. West Buena Vista Land Co.*, 104 Va. 580, 52 S. E. 343; 7 Va. Law Reg. 476. (1254)

government survey, as previously described,¹ the most usual and safest method of describing land, at least country land, is by metes and bounds, that is, by the selection of certain landmarks or "*monuments*" of as permanent a nature as possible, situated at the angles of the boundary lines, and by survey marking the courses and distances between them. The accurate description of these monuments (if *permanent*) and the accurate statement of the courses and distances between them constitute perhaps the best and safest description practicable, in the absence of a government survey.

The purpose of course is to mark out the boundaries by mathematical lines, and to this end *monuments* are not essential, though very useful for the purpose of correcting defective measurements. Usually, both monuments and courses and distances are employed, and if there be any irreconcilable divergence between them, the courts will look to the *intention* of the parties, so far as it can be ascertained, to determine which should prevail.^{1a} But in the absence of evidence of intention on this point, the general presumption is that a call for *fixed monuments* is to take precedence over inconsistent calls for *courses and distances* upon the theory that the former are more apt to have been in the minds of the parties than mere imaginary mathematical lines.²

So also, in case of a conflict between the *distance* of one line and the *course* of another, the general rule is that the *intention* of the parties shall control, and no arbitrary rule can be laid

1. Ante, § 1149.

1a. *Green v. Pennington*, 105 Va. 807, 808, 54 S. E. 877; *Smith v. Chapman*, 10 Gratt. (Va.) 445; *Schwalm v. Beardsley*, 106 Va. 407, 56 S. E. 135; *Fentress v. Pocahontas Fowling Club* (Va.), 60 S. E. 633.

2. 2 Min. Insts. 22, 23; 2 Tiffany, Real Prop., § 390; *Fentress v. Pocahontas Fowling Club* (Va.), 60 S. E. 633; *Schwalm v. Beardsley*, 106 Va. 407, 56 S. E. 135; *Newsom v. Prior*, 7 Wheat. 10; *White v. Luning*, 93 U. S. 514; *Murdock v. Chapman*, 9 Gray (Mass.) 156; *Pernam v. Wead*, 6 Mass. 131; *Buffalo, etc., R. Co. v. Stigeler*, 61 N. Y. 348; *White v. Williams*, 48 N. Y. 344; *Cox v. Couch*, 8 Penn. St. 147; *Riley v. Griffin*, 16 Ga. 141, 60 Am. Dec. 726; *Johnson v. Archibald*, 78 Tex. 96, 22 Am. St. Rep. 27.

(1255)

down that the distance must yield to the course, or *vice versa*.³ Perhaps, however, in the absence of any positive evidence of intention, a presumption may arise in favor of the *course* over the *distance*, upon the theory that chain carriers are more likely to make mistakes in measuring the distance than the surveyor is in ascertaining the course in surveying land.⁴

A "monument" consists of any object or mark on the land which may serve to locate the boundary line at a given point. It may be a river, rock, tree, or other natural object, more or less permanent, or it may be artificial, as a wall, post, ditch or road.⁵ If a corner monument be itself a part of adjoining land or a structure thereon, as a house, which includes the land under it, the boundary, in the absence of evidence of a contrary intent, will begin at or extend to the *side or edge* of the monument only.⁶ But if the monument does not itself constitute land nor involve the occupation of land, such as a river, highway, wall, tree or post, the boundary line in general extends to the *center* thereof.⁷

A "course" is the *direction* in which a line runs, stated with reference, not to its *terminus*, but to its correspondence with a certain *point of the compass*;⁸ while surveyors' tables of measurements are ordinarily used in measuring the *distances*, that is, rods, perches, poles, etc.

3. *Green v. Pennington*, 105 Va. 808, 54 S. E. 877; *Clements v. Kyle*, 13 Gratt. (Va.) 468; *Smith v. Chapman*, 10 Gratt. 445; *Ruffner v. Hill*, 31 W. Va. 434, 7 S. E. 13; *Preston v. Bowman*, 2 Bibb (Ky.) 493; *Loving v. Norton*, 8 Greenl. (Me.) 61; *Scammon v. Sawyer*, 4 Greenl. 429.

4. *Green v. Pennington*, 105 Va. 807, 54 S. E. 877.

5. 2 *Tiffany*, Real Prop., § 390.

6. *Schwalm v. Beardsley*, 106 Va. 409, 56 S. E. 135; *Boston v. Richardson*, 13 Allen (Mass.) 146, 154.

7. *Schwalm v. Beardsley*, 106 Va. 409, 56 S. E. 135; *Durbin v. Roanoke B'ld'g Co.*, 107 Va. 753, 60 S. E. 86; *Boston v. Richardson*, 13 Allen (Mass.) 146, 154; *Freeman v. Bellegarde*, 108 Cal. 179; *Warner v. Southworth*, 6 Conn. 471; *Warfel v. Knott*, 128 Penn. St. 528, 532, 18 Atl. 390.

8. 2 *Tiffany*, Real Prop., § 390.
(1256)

§ 1152. Same—IV. Description of City Lots by Reference to Streets and Numbers.

While the conveyance of a house in a city by its street and number is a sufficiently certain description, it would be imprudent to depend upon that alone, as the system of numbering might at any time be altered, and the possibility might throw doubt and uncertainty around the title.

The system of streets in a city, however, are sufficiently permanent to be regarded as good monuments from which the calls for distances may be made. Caution must be exercised, however, in such descriptions, to give accurately, with reference to the points of the compass or otherwise, the particular corners of the intersecting streets from which the measurements are to be made, as well as the directions or courses and distances.¹ The distances in such cases are usually measured by feet and inches.

§ 1153. Same—V. Description by Reference to a Prior Conveyance.

It is quite usual in describing land conveyed in a deed to refer to a prior deed conveying the same land, whereby the description contained in the prior deed is made part of the latter. If the first description is accurate, and the land conveyed by both deeds is identically the same tract, neither more nor less, this is an excellent mode of describing land, as it tends to prevent, rather than to create, confusion in the title. But if the latter deed purports to convey only a portion of the land transferred by the prior conveyance, or necessitates in any way a change of boundary lines, it would be imprudent to depend upon the description in the prior deed, though reference may be made thereto for the purpose of showing from what source the land was derived and as a help to trace the title,¹ and as an additional aid in identifying the land.²

1. See *Clarke v. Hutzler*, 96 Va. 73, 30 S. E. 469.

1. See *Clarke v. Roller*, 104 Va. 472, 51 S. E. 816.

2. *Glenn v. Augusta Perpetual B. & L. Co.*, 99 Va. 700, 40 S. E. 25.
(1257)

§ 1154. Same—VI. Description by Quantity of Land or Number of Acres.

This, like the last mentioned, is generally used merely as a subordinate and inferior mode of describing the land conveyed. Indeed, it is not a description of *boundaries* at all, but is sometimes useful as corrective or cumulative matter of description. If, however, it is inconsistent with the other more important and valuable elements of description, it must give way to them. Thus, where the quantity, or estimated quantity of land to be transferred is inconsistent with the calls for monuments or courses and distances, or with a description in a prior deed to which reference is made, it must yield to them.¹

§ 1155. Same—VII. Effect of Deed in Passing with the Land All Buildings, Privileges and Appurtenances.

"Land, in the legal signification," says Lord Coke, "comprehendeth any ground, soil or earth whatsoever, as meadows, pastures, woods, moors, waters, marshes, furzes and heath." "It legally includeth also castles, houses and other buildings."¹ And from the same authority we learn that all things *appendant and appurtenant* to the land, as incidents or adjuncts thereto, such as easements, profits *a prendre*, etc., shall pass with the manor, without express mention.² But *land* cannot be appurtenant to other land, so as to pass by deed unless it comes within the description contained in the deed.³

1. Reid v. Rhodes, 106 Va. 701, 56 S. E. 722; Glenn v. Augusta Perpetual B. & L. Co., 99 Va. 700, 40 S. E. 25; Doe v. Thompson, 5 Cow. (N. Y.) 371; Petts v. Gaw, 15 Penn. St. 218; Emery v. Fowler, 38 Me. 99; Thompson v. Sheppard, 85 Ala. 611; Doe v. Porter, 3 Ark. 18, 36 Am. Dec. 448; Ray v. Pease, 95 Ga. 153. As to the effect of a substantial mistake as to the quantity of land conveyed in equity, see post, §§ 1187, 1308; 2 Min. Insts. 702, et seq.; Berry v. Fishburne, 104 Va. 459, 51 S. E. 827.

1. 1 Th. Co. Lit. 197; 2 Min. Insts. 918.

2. 1 Th. Co. Lit. 205; 2 Min. Insts. 918; Norfolk & W. R. Co. v. Obenchain, 107 Va. 600, 59 S. E. 604.

3. See Lee v. Bumgardner, 86 Va. 315, 10 S. E. 3. (1258)

All these propositions, namely, that the grant of *land* at common law carries with it, as included therein, without express mention, all trees, houses and other buildings (for *cujus est solum ejus est usque ad coelum*), and also things *appendant* and *appurtenant* thereto, are well settled.⁴

The Virginia statute therefore (taken from 8 & 9 Vict. cc. 119, 124), which enacts that “every deed conveying land shall, unless an *exception* be made therein, be construed to include all buildings, privileges and appurtenances of every kind, belonging to the lands therein embraced,” seems to be merely an affirmation of the common law.⁵

§ 1156. The Consideration Supporting the Deed—Discussion Outlined.

The important and extensive subject of the consideration to support a conveyance may be developed under the following heads: (1) Effect of want of consideration; (2) Effect of a recital in the conveyance of the payment of the consideration; (3) Illegal considerations; (4) Considerations involving fraud; (4) Considerations involving mistake or misapprehension.

§ 1157. I. Effect of Want of Consideration.

As *between the parties*, a conveyance needs no consideration to support it, being an executed contract, except that, at common law and perhaps in Virginia also, in order that a deed may take effect as a *bargain and sale* under the statute of Uses, a *valuable* consideration must move from the bargainee, and in order that it may operate as a *covenant to stand seised*, there must be, both at common law and in Virginia, a consideration of *natural love and affection*, that is, the covenantee must be nearly related to the covenantor by blood or affinity.¹ But in Virginia,

4. 2 Min. Insts. 919; Sheppard's Touchst. 89, et seq., where ample explanations and illustrations are given.

5. Va. Code, 1904, § 2443; 2 Min. Insts. 919; Norfolk & W. R. Co. v. Obenchain, 107 Va. 600, 59 S. E. 604.

1. Ante, §§ 450, 454; 2 Min. Insts. 807, 809.

inasmuch as the deed will be supported as a *grant* under the statute of Grants or of Future Grants,² even though it fails of effect as a bargain and sale or covenant to stand seised because of the want of a proper consideration, this is of no practical importance, with us. A want of consideration therefore is no ground for *invalidating* a conveyance as between the parties,³ though, where it is manifest that there was not an intention to make a *gift* of the land, it may be a ground for raising a *resulting trust* in the grantee in favor of the grantor.⁴

As to *third persons*, however, who are *creditors* of the grantor *at the time of the conveyance*, the Virginia statute of "Voluntary Conveyances"⁵ enacts that a conveyance "which is not upon consideration *deemed valuable in law*, or which is upon consideration of marriage, shall be *void* as to creditors whose debts shall have been contracted *at the time it was made*, but shall not, on that account merely, be void as to creditors, whose debts shall have been contracted or as to purchasers who shall have purchased *after* it was made; and though it be decreed to be void as to *prior* creditors because voluntary or upon consideration of marriage, it shall not, *for that cause*, be decreed to be void as to *subsequent* creditors or purchasers."⁶

Except, therefore, in cases wherein *existing creditors* of the grantor are concerned, the only inquiry of importance touching the consideration of a conveyance is whether it is *legal* or *vicious*, or whether it involves *mistake* or *misapprehension*.⁷

Before leaving this branch of the subject, however, it may be observed that a consideration, the performance of which is utterly and naturally *impossible*, can confer no benefit, and is therefore equivalent to no consideration at all; nor will the law notice an act that is obviously impracticable and ridiculous, as that A shall

2. Va. Code, 1904, §§ 2417, 2418.

3. 2 Min. Insts. 663, 664.

4. Ante, § 469; 2 Min. Insts. 219.

5. Va. Code, 1904, § 2459.

6. See post, § 1179, et seq.

7. 2 Min. Insts. 664; 2 Lom. Dig. 25, 382, 404; 2 Washburn, Real Prop. 652.

go from San Francisco to London in an hour. In such cases, the situation is the same as if no consideration at all were mentioned in the conveyance.⁸

§ 1158. II. Effect of Recital in Conveyance of Payment of Consideration.

Where there is a valuable consideration to support the conveyance, it is usual to recite the fact in the conveyance, as well as the amount thereof; and indeed, even in cases of *gift*, it is quite usual, though scarcely necessary in modern times, to recite the payment of a nominal consideration, such as one dollar, upon the theory that there should be a valuable consideration to support the deed as a *bargain and sale*, and also in order to rebut any implication of a *resulting trust* in favor of the grantor.¹ *E converso*, the recited consideration can never be questioned or contradicted, *as between the parties*, (1) for the purpose of showing that the deed was not founded on a valuable consideration, and so defeat it; or (2) for the purpose of raising a resulting trust in the grantor, especially where a third person, in reliance upon such recital, has acquired rights thereunder. In the absence of fraud or mistake, the recital must be treated as conclusive for the purpose of giving effect to the operative words of the conveyance.²

It is also customary, where the whole or part of the consideration has been paid in cash at the time of the conveyance, to acknowledge therein the receipt of so much as has been paid, and such acknowledgment or recital is, as between the parties, *conclusive* of the fact that there was a valuable consideration, for the purpose of supporting the conveyance.³ But it is not conclu-

8. 2 Min. Insts. 703; 1 Chitty, Cont. 64.

1. Ante, § 469; 2 Min. Insts. 219, 807; 2 Tiffany, Real Prop., § 384; 2 Story, Eq. Jur., § 1199; Watkins v. Robertson, 105 Va. 284, et seq., 54 S. E. 33; Gould v. Lynde, 114 Mass. 366; Feeney v. Howard, 79 Cal. 525, 12 Am. St. Rep. 162; Moore v. Jordan, 65 Miss. 229, 7 Am. St. Rep. 641.

2. Watkins v. Robertson, 105 Va. 284, et seq., 54 S. E. 33.

3. 2 Tiffany, Real Prop., § 384; 2 Pomeroy, Eq. Jur., § 1036; Dev-
(1261)

sive either upon the *parties* or upon *third persons* as to the *amount* of the consideration paid or due.⁴ Indeed as to third persons having no connection with the deed, such a recital, even though in writing and under seal, is mere *hearsay*, and will not ordinarily be received in evidence at all.⁵ Hence a subsequent purchaser cannot prove himself a "complete purchaser" as against a prior grantee of the same land holding under an unregistered deed merely by reference to such a recital in his deed.⁶

§ 1159. III. Illegal Considerations in General.

The law habitually seeks to discourage the doing of illegal acts or acts contrary to public policy, and, in the main, experience has proved that the best way to discourage them is to leave either guilty party without redress from the courts in case the other equally guilty party shall have taken undue advantage of him.

This general principle finds expression in two maxims which the courts have frequent occasion to use, namely, (1) that no one alleging his own fraud is to be heard (*nemo allegans suam turpitudinem audiendus est*); and (2) that in case of equal guilt, the position of the defendant (or party in possession) is

lin, Deeds, § 834; *McCrea v. Purmort*, 16 Wend. (N. Y.) 460, 30 Am. Dec. 103; *Finlayson v. Finlayson*, 17 Or. 347, 11 Am. St. Rep. 836; *Russ v. Mebins*, 16 Cal. 350.

4. 2 Min. Insts. 689, 690; 1 Greenleaf, Ev., § 26, n. (1); *Gatewood v. Burrus*, 3 Call (Va.) 194; *Rucker v. Lowther*, 6 Leigh (Va.) 259; *Harvey v. Alexander*, 1 Rand. (Va.) 219, 10 Am. Dec. 519; *Watkins v. Robertson*, 105 Va. 285, 54 S. E. 33; *McCrea v. Purmort*, 16 Wend. (N. Y.) 460, 30 Am. Dec. 103; *Hebbard v. Haughran*, 70 N. Y. 54; *Wilkinson v. Scott*, 17 Mass. 249; *Goodspeed v. Fuller*, 46 Me. 141; *Byers v. Locke*, 93 Cal. 493, 27 Am. St. Rep. 212; *Michael v. Foil*, 100 N. C. 178, 6 Am. St. Rep. 577. See *Scott v. Thomas*, 104 Va. 330, 51 S. E. 829.

5. *Lamar v. Hale*, 79 Va. 147; *Bugg v. Seay*, 107 Va. 650, 651, 60 S. E. 89; *Henry v. Raiman*, 1 Casey (Penn.) 360, 64 Am. Dec. 703. Note to *Basset v. Nosworthy*, 2 White & Tud. Lead. Cas. Eq. 100.

6. *Bugg v. Seay*, 107 Va. 651, 60 S. E. 89; post, §§ 1408, 1409. (1262)

superior, *in pari delicto, conditio defendentis* (or *possidentis*) *melior est*.¹

The general principle is that *the plaintiff* is denied relief. But the plaintiff will be the one party or the other according as the contract is *executory* or *executed*. If S (vendor) and P (vendee), for an illegal consideration, enter into a transaction touching the transfer of land, if it be an *executory* contract for the sale of the land, P will in general be the plaintiff who would be denied relief in the courts; whereas, if the contract were an *executed conveyance*, S would more usually be the plaintiff to whom relief would be denied, and P might retain possession of the land secure from attack by S on the ground of the illegality of the consideration.

Illegal considerations are of various kinds, consisting of such as are illegal because of their violations of general public policy, as well as of some positive rule of law or statute.

To the first class belong considerations of an *immoral* character or tendency (*pro turpi causa*), such as a consideration of *future* illicit cohabitation;² or considerations involving *unreasonable restraint of trade*, or affecting freedom of marriage.³

As to considerations declared illegal by *statute*, not only is every contract and conveyance void which touches what is expressly prohibited by statute, but also in general where the statute only inflicts a *penalty*; for a penalty usually implies a prohibition, or at all events, indicates a policy of the law which the transaction tends to thwart. No suit lies at law or in equity to

1. Post, § 1170; 2 Min. Insts. 676; *Cardwell v. Kelly*, 95 Va. 570, 28 S. E. 953.

2. 2 Min. Insts. 282, 664; 2 Th. Co. Lit. 24, n. (P). If the consideration be *past* cohabitation with an *unmarried* woman, it would be good, upon the presumption that it is intended as a compensation for the wrong done. But if either party were married, and that fact were known to the other at the time, the consideration is deemed illegal, whether it be of *past* or *future* cohabitation. 2 Min. Insts. 282; 2 Th. Co. Lit. 24, n. (P).

3. All these have been treated more or less fully in connection with *conditions*, to which the student is referred. See ante, § 566, et seq.; 2 Min. Insts. 664, 282, 283.

enforce or give effect to what is thus at war with public policy. It is conceivable, however, that the penalty is not designed to prevent the transaction in question, but to attain a collateral object; as for example, to induce the payment of taxes assessed upon licenses for the conduct of certain business avocations; and where such is the case, the contract or conveyance remains unimpaired.⁴

§ 1160. IV. Considerations Involving Fraud—Discussion Outlined.

There are various kinds of fraudulent transactions, which, as they relate to the conveyance of land, may be classified as follows: (1) Fraud in the *execution* of a deed, or fraud in *esse contractus*; and (2) Fraud in the *procurement* of the deed or *fraudulent considerations*.

The second of these divisions may be subdivided into the following heads: (1) Frauds worked upon *a party* to the transaction, under which head may be considered, (a) Actual fraudulent representations or concealments; (b) Fraud manifested in inequitable bargains, and (c) Fraud presumed from the circumstances and condition of the parties; (2) Frauds worked upon *third persons*, wherein we shall consider, (a) Fraudulent and catching bargains with heirs, reversioners and other expectants, (b) Conveyances in fraud of third persons generally, and (c) Conveyances in fraud of creditors and purchasers.

These will be discussed in consecutive order.

§ 1161. A. Fraud in *Esse Contractus*, That Is, in the Execution of the Conveyance.

The *common law* allows fraud to be proved in order to vacate

4. 2 Min. Insts. 665; 3 Min. Insts. 99, et seq.; 2 Lom. Dig. 399; 1 Parsons, Cont. 382, n. (d); Little v. Poole, 9 B. & Cr. 192; Cope v. Rowland, 2 M. & W. 157, et seq.; Smith v. Mawhood, 14 M. & W. 452; Cundell v. Dawson, 4 C. B. 397; Tabb v. Baird, 3 Call (Va.) 275. See Fayette Land Co. v. Louisville & N. R. Co., 93 Va. 284, 24 S. E. 1016. Perhaps the most prominent instances of this sort of illegal consideration are afforded by the gaming statutes. Va. Code, 1904, §§ 2836, et seq., 3815, et seq.; 2 Min. Insts. 665, et seq. (1264)

a deed, where the fraud relates to the *execution* of the instrument (fraud *in esse contractus*); as where it is *misread* to the party, or he is induced to sign one instrument when he intended to sign another; but not where the alleged fraud consists in imposing upon the party in a settlement of accounts, or by a false or fraudulent statement of facts, and the like.¹

And though in Virginia there is a statute allowing a *defendant* to file a plea in the nature of a set-off alleging (*inter alia*) fraud in the *procurement* of a contract or any such matter *existing before its execution* as would entitle him to damages at law or relief in equity,² yet there are still many cases in which fraud is wholly *irremediable at law*, and others where it can be *adequately* relieved against in equity only, which often goes not only beyond, but even contrary to the rules of law; whilst it possesses in all cases of frauds, concurrent jurisdiction with the law courts, and in many cases an exclusive jurisdiction.³

§ 1162. B. Fraud in the Procurement or Inducement Directed against a Party to the Deed—1. Actual Fraudulent Representations or Concealments.

This is the plainest and simplest case of fraudulent consideration, which assumes many guises. It needs little exposition.

It comprises those cases which arise out of the suggestion of falsehood (*suggestio falsi*) or the suppression of truth (*suppressio veri*). The *suggestion of falsehood* is a misrepresentation, by acts or artifice, as well as by assertion, whether with intent to deceive or not, if it *actually did deceive*,—of something *material*,—in regard to which a known trust or confidence was placed in the party misrepresenting, by the other party,—which matter constituted an *inducement or motive* to the act or omission of the party to whom the misrepresentation was made, and by which he was *actually misled* to his injury; and the *suppres-*

1. 2 Min. Insts. 669; 2 Lom. Dig. 382.

2. Va. Code, 1904, § 3299, et seq.; 2 Min. Insts. 669.

3. 2 Min. Insts. 669; 2 Lom. Dig. 382; Buck v. Ward, 97 Va. 209, 33 S. E. 513; Kane v. Virginia Coal & I. Co., 97 Va. 329, 33 S. E. 627.

sion of truth is an undue concealment or non-disclosure of facts and circumstances which one party is under a *legal or equitable obligation* to communicate, and which the other party has a right, not merely in conscience, but *juris et de jure*, to know. Thus, where an heir at law, who knew not that the will which devised the estate away from him was *defectively executed*, for a trifling sum of money released all his right in the land to the devisee, by a deed which recited that the will was *duly executed*, it was held that the recital that the will was duly executed was *suggestio falsi*, and that the concealment from the heir that the will was not duly executed was *suppressio veri*, either of which, and much more both, would invalidate the deed of release.¹

It must be observed, however, that fraud is never to be *presumed*. It must be distinctly alleged, although it is not necessary to charge it in direct terms, if the facts stated make out a case of fraud, and it must be clearly proved as alleged.² But the statement that fraud is never to be presumed must be understood in its correct sense. As a matter of fact, in the great majority of cases, fraud is of that secret nature which can only be estab-

1. 2 Min. Insts. 670; 1 Min. Insts. 248; 2 Lom. Dig. 384, 385; 1 Story, Eq. Jur., § 191, et seq.; 2 Pomeroy, Eq. Jur., § 886, et seq.; Broderick v. Broderick, 1 P. Wms. 239. See Lee v. Monroe, 7 Cr. 368; Smith v. Richards, 13 Pet. 26; Stuart v. Luddington, 1 Rand. (Va.) 403, 10 Am. Dec. 550; Crump v. U. S. Min. Co., 7 Gratt. (Va.) 353, 56 Am. Dec. 116; Grim v. Byrd, 32 Gratt. 300; Linhart v. Foreman, 77 Va. 544; Hull v. Fields, 76 Va. 594; Lowe v. Trundle, 78 Va. 67; McMullin v. Sanders, 79 Va. 362; Rorer Iron Co. v. Trout, 83 Va. 406, 5 Am. St. Rep. 285, 2 S. E. 713. Even in judicial sales under a decree of court, if it be made to appear, either before or after the sale has been confirmed, that there has been any injurious mistake, misrepresentation, or fraud, the biddings should be opened, the reported sale rejected, or the order of confirmation rescinded, and the property re-sold. Merchants' Bank v. Campbell, 75 Va. 455, 462-3; 2 Min. Insts. 670.

2. 2 Min. Insts. 670; Hord v. Colbert, 28 Gratt. (Va.) 49; Rixey v. Moorhead, 79 Va. 590; Gregory v. Peoples, 80 Va. 359; Houghton v. Graybill, 82 Va. 580; Hickman v. Trout, 83 Va. 490, 3 S. E. 131; Southall v. Farish, 85 Va. 403, 1 L. R. A. 641, 7 S. E. 534; Alsop v. Catlett, 97 Va. 364, 34 S. E. 48.

(1266)

lished by circumstantial evidence and by inferences from known facts. It is not therefore meant to say that fraud can never be inferred from facts proved to exist, but merely that there shall be *no presumption of the existence of facts* from which fraud may be inferred, since that would be to found a *presumption upon a presumption*, which the law abhors as nature a *vacuum*.³

No right can be deduced from a fraudulent act, the law affording no countenance to the fraudulent transaction so as to protect the perpetrator.⁴ Hence, if one fraudulently collude with a debtor to buy the debtor's land, ostensibly for himself, but really for the debtor, and makes payments upon the purchase, he cannot claim to charge the land, as against the creditors of the debtor, with an *implied trust* in his favor, in order to secure the payments he has made.⁵

§ 1163. Same—2. Fraud Manifested in Inequitable Bargains.

Here the fraud is apparent from the intrinsic nature and subject of the bargain itself, being such as no man in his senses, and not under a delusion would make, on the one hand, and no honest and fair man would accept, on the other.¹

Mere inadequacy of price, standing by itself and independent of other circumstances, is not sufficient to set aside a transaction. But inadequacy, accompanied by other circumstances (*e. g.*, weakness of understanding in the grantor or grantee; fraud, imposition, mutual mistake, or standing in a relation of influence), may readily make out a case of fraud;² and it is said that if the

3. See *Burch v. Smith*, 15 Tex. 219, 65 Am. Dec. 160, note.

4. 2 Min. Insts. 671; *Williamson v. Goodwyn*, 9 Gratt. (Va.) 506, 507; *Henderson v. Hunton*, 26 Gratt. 933, 934; *Almond v. Wilson*, 75 Va. 626.

5. 2 Min. Inst. 671; *Almond v. Wilson*, 75 Va. 614.

1. 2 Min. Insts. 671; 2 Lom. Dig. 383, 386.

2. 2 Min. Insts. 671; *Samuel v. Marshall*, 3 Leigh (Va.) 567; *Greer v. Greer*, 9 Gratt. (Va.) 330; *Lowe v. Trundle*, 78 Va. 69; *Crebs v. Jones*, 79 Va. 382; *Smith v. Hinkel*, 81 Va. 524; *Fishburne v. Ferguson*, 84 Va. 87, 4 S. E. 575; *Allore v. Jewell*, 94 U. S. 506.

inadequacy be so gross and manifest that it cannot be stated to a man of common sense without shocking the conscience and confounding the judgment, it suffices *of itself* (in the absence of adequate explanation), to prove that a fraudulent advantage was taken, as it shows that the person did not understand the bargain he made, or that he was so oppressed that he was glad to make it, knowing its inadequacy.³

§ 1164. Same—3. Fraud Presumed from the Circumstances and Condition of the Parties.

This class comprehends cases where advantage has been taken of the mental weakness, or of the necessities or actual condition of one of the contracting parties, putting him under the power of the other; or of undue influence arising out of the nature of the social relation in which the parties stand to each other; or of business relations inconsistent for the time being with the transaction in question.¹

Weakness of mind alone, where there is a legal capacity for business, does not invalidate an instrument; but if connected with any circumstances of surprise, inadequate consideration, undue influence, or the like, it affords strong and, in general, satisfactory proof of fraud. The question always is, whether the party has yielded an intelligent and willing consent to the transaction; and if it appear, considering all the facts—mental weakness being one—that such consent is wanting, the act is void. But the influence resulting from attachment, or the mere desire to gratify another's wishes, if the party's free agency be not impaired, does not affect the validity of the act any more than does the fact that it seems to others unreasonable, imprudent, or unaccountable.²

3. 2 Min. Insts. 671; 2 Lom. Dig. 386; *McKinney v. Pinkard*, 2 Leigh (Va.) 149, 21 Am. Dec. 601; *Cribbins v. Markwood*, 13 Gratt. (Va.) 495, 67 Am. Dec. 775; *Mayo v. Carrington*, 19 Gratt. 74, 197; *Brown v. Rice*, 26 Gratt. 470, 474; *Flook v. Armentrout*, 100 Va. 638, 42 S. E. 686; *Osgood v. Franklin*, 2 Johns. Ch. (N. Y.) 23, 1 White & Tud. Lead. Cas. Eq. 420.

1. 2 Min. Insts. 672; 2 Lom. Dig. 387, et seq.

2. 2 Min. Insts. 672; 1 Jarman, Wills, 35, et seq.; 1 Redfield, Wills, (1268)

Transactions between attorney and client, parent and child, guardian and ward, and other persons connected by peculiarly confidential relations, are looked upon with jealousy; and if improper advantage is taken of the parental or tutorial authority, or of the influence belonging to the relation, the transaction will be invalidated; and as between guardian and ward, it is established that a deed of gift, or a release made by the ward soon after coming of age, and at the very time of accounting and delivering up the estate, or before delivering up the estate, without any settlement, is absolutely void, upon a principle of public policy, as constructively fraudulent, although, in truth, it be fair, and much more if the circumstances evince actual fraud.³ Moreover, trustees, agents, attorneys, and other persons occupying a fiduciary relation, are peremptorily inhibited from dealing *for their own benefit* touching the subject matter committed to them; and any such transactions are regarded as constructively fraudulent, and voidable at the election of the beneficiary.⁴

It should be observed, however, that where a legal capacity is shown to exist, that the party had sufficient understanding to comprehend clearly the nature of the business—that he consented freely to the special matter about which he was engaged, and no fraud or undue influence is shown to have been used to

509, et seq., 514, et seq.; 2 Lom. Dig. 388; *Harvey v. Pecks*, 1 Munf. (Va.) 518; *Samuel v. Marshall*, 3 Leigh (Va.) 567; *Greer v. Greer*, 9 Gratt. (Va.) 330; *Parramore v. Taylor*, 11 Gratt. 220; *Simmerman v. Songer*, 29 Gratt. 24; *Orr v. Pennington*, 93 Va. 268, 24 S. E. 928

3. 2 Min. Insts. 672, 673; 2 Lom. Dig. 391; 1 Story, Eq. Jur., § 317, et seq.; 1 Jarman, Wills, 36, et seq., n. (1); *Waller v. Armistead*, 2 Leigh (Va.) 11, 21 Am. Dec. 594; *Riddell v. Johnson*, 26 Gratt. (Va.) 152. A similar principle is applicable to grants obtained by a person having a *spiritual ascendancy* over another who is in a state of religious delusion or extravagant excitement. 2 Min. Insts. 673; 2 Lom. Dig. 392; *Norton v. Kelley*, 2 Eden. 286; *Hugein v. Baseley*, 14 Ves. 273.

4. Ante, § 478, et seq.; 2 Min. Insts. 245; 2 Lom. Dig. 392; 1 Story, Eq. Jur., § 311, et seq.; *Moseley v. Buck*, 3 Munf. (Va.) 232, 5 Am. Dec. 508; *Buckles v. Lafferty*, 2 Rob. (Va.) 294, 40 Am. Dec. 752; *Bailey v. Robinson*, 1 Gratt. (Va.) 4, 9, 10, 42 Am. Dec. 540; *Armistead v. Hundley*, 7 Gratt. 52; *Howery v. Helms*, 20 Gratt. 1, 7, et seq. (1269)

bring about the result—the validity of the disposition cannot be impeached, however unreasonable, or imprudent, or unaccountable it may seem to others.⁵

§ 1165. C. Fraud in the Procurement of Inducement, Directed against Third Persons—(A) Catching Bargains with Heirs, Reversioners and Other Expectants.

Bargains made with or conveyances taken from heirs, reversioners, or other *expectants*, in the lifetime of their ancestors or relations, from whom is the expectation of the estate, tend to deceive and disappoint the relations from whom the expected property is to be derived.¹

These have been generally mixed cases, compounded of all or several species of fraud; there being sometimes proof of actual fraud, which is always decisive. The proof of fraud is generally supplied by inference from the circumstances or condition of the parties contracting; weakness on one side, and usury, or extortion taking advantage of weakness, on the other. The nature of the bargain, *c. g.*, its unconscionableness, although there be no circumvention, often detects the fraud. And in most cases have concurred deceit and illusion practiced on other persons not privy to the agreement; as on the father or other relation from whom comes the expectation of the estate; the expectant has been induced to conceal his circumstances from those whose advice and encouragement might have tended to his relief, and also to his reformation; and the ancestor being deceived to leave his estate, not as he designed, to his heir or family, but to the artful intriguers who have already divided the spoil.²

5. 2 Min. Insts. 673; Greer *v.* Greer, 9 Gratt. (Va.) 333; Orr *v.* Pennington, 93 Va. 268, 24 S. E. 928.

1. 2 Min. Insts. 698. For legality of agreement between prospective heirs to divide parent's estate *equally* amongst them, see post, § 1314; Nelson *v.* Nelson, 1 Wash. (Va.) 136. For agreements made by heirs with the ancestor himself, announcing the portions to be taken by them by descent, see ante, § 991; Headrick *v.* McDowell, 102 Va. 124, 102 Am. St. Rep. 843, 65 L. R. A. 578.

2. 2 Min. Insts. 698; 2 Lom. Dig. 398; 1 Story, Eq. Jur., § 334. (1270)

In all cases of this sort, it is incumbent upon the party dealing with the expectant to establish, not only that he took no advantage, and was guilty of no direct fraud, but that he paid a full and adequate consideration, and that the contract is above all exception.³

Indeed, the better opinion,—in this country, at least,—seems to be that an expectant *heir* or *devisee* has no interest in the ancestor's or testator's estate, during the latter's lifetime, that can be sold, incumbered or devised.⁴

In England, this doctrine has been applied not only to expectant *heirs*, but also (with doubtful expediency) to *reversioners* and *remaindermen*, dealing with property already vested in them, but not in possession, and, therefore, apt to be underestimated by the necessitous, the improvident and the young.⁵

But this English rule of policy, which deprives the owner of a *vested* remainder or reversion of the free alienation of his property, and, obliging him to forego any benefit which he might derive by negotiating a *private sale* thereof, constrains him to sell at *public auction* (so as to afford satisfactory proof of an adequate price), or to hold on to an unproductive reversion or remainder, perhaps till the decline of life, is not adapted to the usages or sentiments of society in this country. The adult proprietor of a *vested* interest in property, whether in reversion or remainder, is not thus to be reduced to a condition of pupillage, from regard to any such supposed rule of policy, or for the purpose of extending to him an ambiguous protection. All attempts thus to fetter the action of the owner by restricting his

3. 2 Min. Insts. 698; 2 Lom. Dig. 398; 1 Story, Eq. Jur., § 236; *Chesterfield v. Janssen*, 2 Ves. Sr. 155, et seq.; 1 White & Tud. Lead. Cas. Eq. 410.

4. *Wheeler v. Wheeler*, 2 Met. (Ky.) 474, 74 Am. Dec. 421; *Needles v. Needles*, 7 Ohio St. 432, 70 Am. Dec. 85, note. But in Indiana it has been held that he can do so with the consent of the ancestor. *McClune v. Raben*, 133 Ind. 507, 36 Am. St. Rep. 588. See *Curtis v. Curtis*, 40 Me. 24, 63 Am. Dec. 651, 654, note.

5. 2 Min. Insts. 698; 2 Lom. Dig. 398, 399; 1 Story, Eq. Jur., § 337, et seq.; *Chesterfield v. Janssen*, 2 Ves. Sr. 155, et seq.; 1 White & Tud. Lead. Cas. Eq. 410, 411.

power of alienation, really operate injuriously to him. The doctrine of imputing fraud as a *matter of law* is not favored with us.⁶

The inquiry, in such cases as we are considering, should be whether in the particular case *actual fraud* existed. Inadequacy of price, youth, inexperience, indebtedness, distress, are circumstances to be looked to and weighed in determining whether, in the particular instance, the bargain is so unconscionable as to demonstrate some gross imposition, circumvention, or undue influence; and so to justify relief on the ground of fraud. In the absence of such proof of actual fraud, it is not incumbent on the purchaser of such an interest in the way of a reversion or remainder, more than in the case of property in possession, in order to make good the bargain, to show that a full and adequate consideration was paid.⁷

§ 1166. (B) Fraud Directed against Third Persons Generally.

"Particular persons in contracts," says Lord Hardwicke in *Chesterfield v. Janssen*,¹ "shall not only transact *bona fide* between themselves, but shall not transact *mala fide* in respect of other persons, who stand in such relation to either as to be affected by the contract, or the consequences of it." Hence, clandestine agreements to return part of the portion of the wife, or provision stipulated for by the husband, to the parent or guardian; or conveyances or bonds taken as rewards for securing marriages; or a secret agreement of a debtor compounding with his creditors, that if a certain one of them will sign the deed, he will pay him *more than a ratable proportion* of his debt; all

6. 2 Min. Insts. 699; *Hutchinson v. Kelly*, 1 Rob. (Va.) 123; *Bank of Alexandria v. Patton*, 1 Rob. 499; *Davis v. Turner*, 4 Gratt. (Va.) 422; *Cribbins v. Markwood*, 13 Gratt. 507, 67 Am. Dec. 775.

7. 2 Min. Insts. 699; *Nichols v. Gould*, 2 Ves. Sr. 422; *Griffith v. Spratley*, 1 Cox 383; *Cribbins v. Markwood*, 13 Gratt. (Va.) 507, 508, 67 Am. Dec. 775; *Watson v. Smith*, 110 N. C. 6, 28 Am. St. Rep. 665; *Stoll v. Franey*, 20 Or. 410, 23 Am. St. Rep. 135, note; *Moody v. Wright*, 13 Met. (Mass.) 17, 46 Am. Dec. 713, note.

1. 2 Ves. Sr. 156, 1 White & Tud. Lead. Cas. Eq. 406, 407. (1272)

these will be set aside in equity, as injurious to the third persons who are thereby respectively deceived.²

So a conveyance made by a *feme sole*, in contemplation of marriage, without the intended husband's knowledge, is deemed in fraud of his marital rights, and therefore voidable;³ and by parity of reason, if a man seised in fee *of lands*, should, just before his marriage, without the privity of the intended wife, convey the same, it deprives the wife of her dower therein, and is liable to be invalidated at her instance, as in fraud of her rights.⁴

§ 1167. (C) Conveyances in Fraud of Creditors and Purchasers—Discussion Outlined.

The instances under this head are of the greatest practical importance and interest, and will require to be unfolded in the following order: (1) The English statutes of Fraudulent Conveyances; and (2) The Virginia statute of Fraudulent Conveyances, under which will be considered (a) The terms of the statute; (b) The validity of the conveyance as between the parties; (c) Who are "creditors" protected under the statute; (d) Who are "purchasers" protected under the statute; (e) Circumstances indicating fraudulent intent; (f) Effect of conveyance being voluntary; (g) Instances of benefits deemed valuable in law;

2. 2 Min. Insts. 673, 674; *Chesterfield v. Janssen*, 2 Ves. Sr. 156, 1 White & Tud. Lead. Cas. Eq. 406, 407.

3. Ante, § 297; 2 Min. Insts. 674; *Jenkins v. Rhodes*, 106 Va. 564, 56 S. E. 332; *Waller v. Armistead*, 2 Leigh (Va.) 14, 21 Am. Dec. 594. This principle however, is subject to several qualifications. Thus, it is admissible for the wife in contemplation of marriage, to convey her property without the husband's knowledge in order to secure a just debt; *Fletcher v. Ashley*, 6 Gratt. (Va.) 332, and even to provide for the children of a previous marriage. 2 Lom. Dig. 396-'7. She may also convey her property to whom she will, if it be done before the marriage is contemplated, notwithstanding it may, in fact, occur soon after. 2 Lom. Dig. 394; *Strathmore v. Bowes*, 2 Cox 28, 1 Ves. Jr., 22, 1 White & Tud. Lead. Cas. Eq. 395; *Gregory v. Winston*, 23 Gratt. 102.

4. 2 Min. Insts. 674; 2 Lom. Dig. 397.

(1273)

(h) Proof of fraud unavailing against a purchaser of the property for value and without notice of the fraud.

§ 1168. Same—The English Statutes of Fraudulent Conveyances.

The English statutes of Fraudulent Conveyances are 13 Eliz. c. 5, and 27 Eliz. c. 4. The first applies to both lands and chattels, and is intended to protect *creditors*, as well subsequent as existing; whilst 27 Eliz. applies to lands alone, and was designed for the benefit of *subsequent purchasers*.¹

It has been said by high authority² that the principles and rules of the common law are so strong against fraud in every shape, that the *common law* would have attained every end proposed by these statutes. This, however, seems somewhat too strong a statement. The common law would certainly avoid any fraudulent conveyance made to deceive one who has an *existing debt or right*; but if the transfer were *precedent* to the debt or right, there is in such case no way at common law to set the conveyance aside.³

1. 2 Min. Insts. 674. The statute 13 Eliz. c. 5, provided that "all and every feoffment, gift, grant, alienation, bargain, and conveyance of lands, tenements, hereditaments, goods and chattels * * * and all and every bond, suit, judgment and execution," made to hinder, delay, or defraud *creditors or others* "of their just and lawful actions, suits, debts, accounts, damages," etc., should be deemed, *as against such person or persons*, his heirs or successors, whose actions, suits, etc., are or might be in any wise disturbed, hindered, delayed, or defrauded, utterly void.

The statute 27 Eliz. c. 4, made perpetual by 39 Eliz. c. 18, enacts in effect that all alienations of *land* made with intent to defraud and deceive *subsequent purchasers* for valuable consideration should, as against such purchasers and those claiming under them, be void, unless the alienation be made for good (construed to mean "*valuable*") consideration and *bona fide*.

2. Lord Mansfield in *Cadogan v. Kennett*, Cowp. 434; Marshall, C. J., in *Hamilton v. Russell*, 1 Cr. 309, 316; and Roane, J., in *Fitzhugh v. Anderson*, 2 Hen. & M. (Va.) 302, 3 Am. Dec. 625.

3. 2 Min. Insts. 674, 675; Bac. Abr. Fraud, (C); *Twyne's Case*, 3 Co. 83.
(1274)

§ 1169. Same—The Virginia Statute of Fraudulent Conveyances—(I) The Terms of the Statute.

"Every gift, conveyance, assignment or transfer of, or charge upon any estate, *real or personal*, every suit commenced, or decree, judgment or execution suffered or obtained, and every bond or other writing given, with intent to hinder, delay, or defraud *creditors, purchasers or other persons*, of, or from what they are or may be lawfully entitled to, shall, *as to such* creditors, purchasers, or other persons, their representatives, or assigns, be void. This section shall not affect the title of a *purchaser for valuable consideration*, unless it appear that he had *notice* of the fraudulent intent of his immediate grantor, or of the fraud rendering void the title of such grantor."¹

These provisions, in pursuance of a rule applicable to all statutes made against fraud, are to be liberally expounded for the suppression of the fraud.²

§ 1170. Same—(II) Validity of the Conveyance as between the Parties.

The statute only avoids the conveyance *as to the creditors, purchasers and other persons*, whom the maker of the conveyance designed to hinder, delay or defraud by it, and as to them alone. As between the *parties* and persons claiming under them, the conveyance is unimpeachable. It is a maxim, adopted from the civil law, in both our law and equity courts, that *nemo allegans suam turpitudinem est audiendus*; and in pursuance of it, wherever the plaintiff and defendant have participated in transactions for the purpose of injuring others, or in violation of law or public policy, in order to discourage such transactions, neither will be helped, either at law or in equity, save only so far as public policy may require.¹

Hence, where property is fraudulently transferred, the grantor

1. Va. Code, 1904, § 2458; 2 Min. Insts. 675. For meaning of term "delay," see *Breeden v. Peale*, 106 Va. 43, 55 S. E. 2; post, § 1174.

2. 2 Min. Insts. 675; 2 Lom. Dig. 419; 2 Bl. Com. 88; *Twyne's Case*, 3 Co. 82a.

1. Ante, § 1159; 2 Min. Insts. 676.

cannot recover it from the fraudulent grantee, because thus the iniquitous object sought to be accomplished is most effectually frustrated, and the temptation to practice such devices is best removed. On the other hand, where the enforcement of the fraudulent or vicious conveyance will most surely attain those ends, it will be enforced; and, therefore, a fraudulent grantee, although *in pari delicto* with the grantor, is allowed to defend his claim to the property, whilst the grantor is not permitted to defeat it by alleging the fraud. In short, the transaction is enforced or avoided, both at law and in equity, as may best answer the purposes of discouraging such evasions of fair dealing, or of sound policy; and it is for this purpose, and not because the defendant is on his own account entitled to any favor, that the rule is established, that *in pari delicto potior est conditio defendentis*.²

It is worth while to observe that the maxim referred to (*nemo allegans suam turpitudinem est audicndus*), does not exclude a confederate in the fraud from disclosing it, at the instance and for the benefit of third persons, *c. g.*, creditors. Thus, one of the grantors in a conveyance impeached by creditors as fraudulent, is a competent witness for the creditors to prove the fraud.³

But in no case can a participant in the fraud impeach the transaction on account of it for his own benefit.⁴ This rule, however, does not apply, if the grantor is mentally incompetent when the deed is executed.⁵

2. Ante, § 1159; 2 Min. Insts. 676; 2 Lom. Dig. 408, 459; *Starke v. Littlepage*, 4 Rand. (Va.) 369; *Chamberlayne v. Temple*, 2 Rand. 384, 14 Am. Dec. 786; *James v. Bird*, 8 Leigh (Va.) 510, 31 Am. Dec. 668; *Terrell v. Imboden*, 10 Leigh 321; *Owen v. Sharp*, 12 Leigh 427; *Cardwell v. Kelly*, 95 Va. 570, 40 L. R. A. 240, 28 S. E. 953. See *Tate v. Building Ass'n*, 97 Va. 79, 75 Am. St. Rep. 770, 45 L. R. A. 243; *Harris v. Harris*, 23 Gratt. (Va.) 738.

3. 2 Min. Insts. 576; *Brown v. Molineaux*, 21 Gratt. (Va.) 548.

4. 2 Min. Insts. 676, 677; *Welfley v. Shenandoah, etc., Co.*, 83 Va. 775, 3 S. E. 376; *Tatum v. Tatum*, 101 Va. 77, 43 S. E. 184; *Ratliff v. Ratliff*, 102 Va. 880, 47 S. E. 1007. But see *Harper v. Harper*, 85 Ky. 160, 7 Am. St. Rep. 583, 587, note.

5. *Tatum v. Tatum*, 101 Va. 77, 43 S. E. 184.

§ 1171. Same—(III) Who Are "Creditors" Protected by the Statute.

The language of the present Virginia statute¹ is less particular in its enumeration than that used in 13 Eliz. c. 5, or in the former Virginia statutes, yet it is supposed to be not less comprehensive. The statute avoids gifts, etc., made "with intent to delay, hinder or defraud *creditors*, purchasers, or *other persons*, of, or from what they are or may be lawfully entitled to." Thus the statute protects persons suing *ex maleficio*, as for adultery or seduction, or any tort, and *a fortiori*, those claiming *ex contractu*, as for a debt, or for breach of an official bond, and that whether as the original creditor or his assignee.²

But no one claiming as a *volunteer* under the grantor (*e. g.*, as his personal representative, or as assignee under a voluntary assignment for the benefit of creditors), has any other rights than the grantor himself had; and no such volunteer, therefore, can affect to set aside a previous fraudulent conveyance of such grantor;³ at least a personal representative cannot do so *in that capacity*; but if he is also a *creditor* of the grantor, he may, *in equity*, as creditor, set the fraudulent conveyance aside.⁴

Formerly it was held that the creditors protected were creditors of the *grantor* who made the conveyance, and none other; and therefore, that in case of a conveyance executed by a married woman before marriage, settling her property on herself, *her* creditors *alone*, and not those of her husband, could impeach

1. Va. Code, 1904, § 2458; ante, § 1169.

2. 2 Min. Insts. 690; 2 Lom. Dig. 445, et seq.; *Twyne's Case*, 3 Co. 82; *Hutchinson v. Kelly*, 1 Rob. (Va.) 136, 39 Am. Dec. 250; *Greer v. Wright*, 6 Gratt. (Va.) 154, 52 Am. Dec. 111; *Clough v. Thompson*, 7 Gratt. 26; *Jackson v. Meyers*, 18 Johns. (N. Y.) 425.

3. 2 Min. Insts. 691; 2 Lom. Dig. 446; *Thomas v. Soper*, 5 Munf. (Va.) 28; *Brownell v. Curtis*, 10 Paige (N. Y.) 218.

4. 2 Min. Insts. 691; *Shields v. Anderson*, 3 Leigh (Va.) 729. But as against a personal representative of a decedent, who fraudulently sells the assets of the estate to one in collusion with him, a *distributee* of the estate may have the protection of the statute. *Robertson v. Ewell*, 3 Munf. (Va.) 7.

the conveyance.⁵ At present, however, the *statute* provides that the words "*creditors*" and "*purchasers*" shall not be restricted to the protection of creditors of, and purchasers from, *the grantor*, but shall extend to and embrace all creditors and purchasers who, but for the deed or writing, would have had a right to subject the property to their debts or purchases.⁶

Formerly also, it was a well established rule that *no creditor at large*, who has not acquired in some way, by judgment, execution, or otherwise, a right to *charge his debtor's property specifically*, could come into equity to impeach such debtor's fraudulent conveyance. For, unless the creditor has established a *certain* claim on the property of the debtor, he has no concern with his frauds; and to allow him to proceed to annul the conveyance, it was thought, might lead to an unnecessary, and perhaps oppressive interruption of the debtor's rights.⁷

But for some years past this rule has been abrogated by statute, and it is now enacted that a creditor, before obtaining an attachment, judgment or decree for his claim, may institute any suit to avoid for fraud a gift, conveyance, assignment, or transfer of, or charge upon, the estate of his debtor, which he might institute after obtaining such judgment or decree; and he may, in

5. 2 Min. Insts. 691; *Pierce v. Turner*, 5 Cr. 154; *Prior v. Kinney*, 6 Munf. (Va.) 510; *Land v. Jeffries*, 5 Rand. (Va.) 211. But see *Anderson v. Anderson*, 2 Call (Va.) 198; *Thomas v. Gaines*, 1 Gratt. (Va.) 347.

6. Va. Code, 1904, § 2472; 2 Min. Insts. 691. See *Harris v. Harris*, 23 Gratt. (Va.) 737; *National Valley Bank v. Hancock*, 100 Va. 101, 93 Am. St. Rep. 933, 57 L. R. A. 728; *Greer v. Wright*, 6 Gratt. 154, 52 Am. Dec. 114, note.

7. 2 Min. Insts. 691, 692. To this doctrine several qualifications were admitted. Thus, if the debtor, by removal out of the state, or by evading the process of the law, put it *out of the creditor's power* to obtain judgment, he might, notwithstanding, prosecute his suit in equity to set the fraudulent conveyance aside. So, also, where the debtor had died before the judgment was obtained. 2 Min. Insts. 692; 2 Lom. Dig. 447; *Chamberlayne v. Temple*, 2 Rand. (Va.) 384, 14 Am. Dec. 786; *Rhodes v. Cousins*, 6 Rand. 190, 18 Am. Dec. 715; *Tate v. Liggett*, 2 Leigh (Va.) 99; *Kelso v. Blackburn*, 3 Leigh 299; *Taylor v. Spindle*, 2 Gratt. (Va.) 44; *Burbridge v. Higgins*, 6 Gratt. 119. (1278)

such suit, have all the relief in respect to said estate to which he would be entitled after obtaining a judgment or decree for the claim.⁸

Creditors *at large* who, in pursuance of this statute, seek to impeach a fraudulent conveyance by a bill in chancery, acquire a *specific lien* on the debtor's estate from the date of bringing the suit (that is, as soon as the *summons issues*), or if they become parties to such suit by *petition*, from the time of the *filing of the petition* in the court or in the clerk's office; but the lien shall not be valid as against *creditors* and *purchasers* for value and without notice until and except a memorandum (setting forth (1) the title of the cause, (2) the general object thereof, (3) the court wherein it is pending, (4) the amount of the claim asserted by the complainant, (5) a description of the property, and (6) the name of the person whose estate is intended to be affected thereby) shall be left with the clerk of the court of the county or corporation wherein the property is, who shall forthwith record the memorandum in the *deed book*, and *index* the same in the name of the person aforesaid. And if the proceeds of the sale be insufficient to satisfy the claims of all the creditors whose liens were acquired *on the same day*, they shall be applied *ratably* to such claims.⁹

It is to be observed that a creditor who successfully attacks a deed of trust on the ground that it secures a *fraudulent* debt, along with other *bona fide* debts, is not entitled to be substituted to the position formerly occupied by the fraudulent debt. His lien, if not previously acquired, dates only from the commencement of his suit, and is subordinate to liens previously acquired. The deed of trust is valid as to the *bona fide* debts secured thereby, and the fraudulent debt is simply eliminated and treated as if it had never been inserted in the deed.¹⁰ And if the deed

8. Va. Code, 1904, § 2460; 2 Min. Insts. 692. See *Tichenor v. Allen*, 13 Gratt. (Va.) 37.

9. Va. Code, 1904, § 2460. See *Davis v. Bonney*, 89 Va. 755, 17 S. E. 229; *Wallace v. Treacle*, 27 Gratt. (Va.) 479; 1 Va. Law Reg. 294; 5 Va. Law Reg. 321, 425.

10. *Craig v. Hoge*, 95 Va. 276, 28 S. E. 317.

is completely and entirely fraudulent, and is set aside as void for the fraud, the property thereby conveyed will be treated as though such deed had never been made.¹¹

It should also be specially noted that when a creditor at large obtains a *mortgage* or *deed of trust* on his debtor's property, he cannot be regarded, under the statute, as a creditor, or in the double character of a creditor and a purchaser, but *only as a purchaser*; and so also, if he takes a conveyance in payment or satisfaction of a *pre-existing debt*.¹²

A purchaser at a sale, for the creditor's benefit, is protected as an incident to the privilege of the creditor himself. And so, although the title of a voluntary or actually fraudulent grantee is liable to be avoided, yet if he sells for value to a purchaser, without notice of the fraud, the latter's title prevails, as, indeed, appears from the *proviso* to the statute itself, namely that it shall not affect the title of a purchaser for valuable consideration, unless it appear that he had *notice* of the fraudulent intent of his immediate grantor, or of the fraud rendering void the title of such grantor.¹³

Where a decree is rendered on behalf of a creditor against several *voluntary donees* of the debtor, a court of equity will decree *contribution* among them, so that each shall only pay his just proportion of the debt. But all the donees will be liable for the failure of any one to pay his proportion, as far as he has received the assets of the donor, until the debt is completely liquidated.¹⁴ The voluntary donee, *without actual fraud*, although in possession, is not accountable for rents and profits prior to the decree, nor for the property itself, or its value if it has been sold or rented, or been accidentally destroyed prior to the filing of the bill; but where there has been *actual fraud*, the

11. *Ferguson v. Daughtrey*, 94 Va. 315, 26 S. E. 822.

12. Ante, § 595; 2 Min. Insts. 692, 696; *Tate v. Liggett*, 2 Leigh (Va.) 84; *Wickham v. Lewis Martin & Co.*, 13 Gratt. (Va.) 437; *Evans v. Greenhow*, 15 Gratt. 153; *Cammack v. Soran*, 30 Gratt. 297.

13. Va. Code, 1904, § 2458; 2 Min. Insts. 692, 693.

14. 2 Min. Insts. 306, 693; *Chamberlayne v. Temple*, 2 Rand. (Va.) 384, 14 Am. Dec. 786; *Lewis v. Overby*, 31 Gratt. (Va.) 620; *Horton v. Bond*, 28 Gratt. 825, 829, 830; *Harman v. Oberdorfer*, 33 Gratt. 507. (1280)

grantee is accountable for rents and profits from the time he came into possession, and perhaps for the property itself, though destroyed by accident.¹⁵

§ 1172. Same—(IV) Who Are the "Purchasers" Protected by the Virginia Statute.

The common law afforded little or no protection to subsequent purchasers, save in those cases where the prior purchaser, by fraudulent assurances, or by as fraudulent silence, or by permitting the seller to retain the possession, or other *indicia* of ownership, actually participated in the deceit. In other cases no remedy existed for the subsequent purchaser, because he had *no interest* at the time of the commission of the alleged fraud.¹

The statute 27 Eliz. c. 4, was therefore even more necessary than 13 Eliz. c. 5, but it related to *land* alone, while 13 Eliz. c. 5, protecting *creditors*, applied to both *real and personal* property.²

But the student will recall that in Virginia the statute of Fraudulent Conveyances embraces both lands and chattels and applies the same provision to purchasers as to creditors.³

It will be remembered also that the statute itself in a general way defines the purchasers who are protected, it being enacted that the protection of the statute shall extend to and embrace all creditors and *purchasers* who, but for the fraudulent deed or writing, would have had a right to subject the property to their claims.⁴

It matters not from whom the defrauded purchaser derives

15. 2 Min. Insts. 693; 2 Lom. Dig. 451; *Blow v. Maynard*, 2 Leigh (Va.) 30; *Clarke v. Curtis*, 1 Gratt. (Va.) 289; *Hobson v. Yancey*, 2 Gratt. 73; *Leake v. Ferguson*, 2 Gratt. 419; *Norman v. Cunningham*, 5 Gratt. 80; *Blackhouse v. Jett*, 1 Brock. (U. S. C. C.) 501, 510, 515; *Sexton v. Wheaton*, 1 Am. Lead. Cas. 85.

1. 2 Min. Insts. 693; 2 Lom. Dig. 452; *Upton v. Bassett*, Cro. Eliz. 445.

2. Ante, § 1168.

3. Va. Code, 1904, § 2458; ante, § 1169.

4. Va. Code, 1904, § 2472.

his title, whether from the original maker of the fraudulent assurance, or from some person claiming under him; in either case the original transaction, thus tainted with the intent to deceive, as proved by the subsequent events, or otherwise, is invalidated. Thus, if a father make a fraudulent lease, and die, and then his son and heir, whether knowing or not knowing of such lease, convey the land for valuable consideration, the purchaser may avoid the lease.⁵

The Virginia statute of Fraudulent Conveyances expressly declares that its provisions "shall not affect the title of a purchaser for *valuable consideration*, unless it appear that he had *notice of the fraudulent intent* of his immediate grantor, or of the fraud rendering void the title of such grantor."⁶ A *voluntary* conveyance, however *mala fide* made, cannot be defeated by a subsequent *voluntary* deed, nor by a will; for, as we have just seen, the purchaser whom the statute designs to protect is the purchaser *for value*.⁷

It should be observed that the intent to deceive and defraud *creditors*, though it were ever so clearly manifested, does not invalidate the conveyance in respect to *purchasers*. A fraudulent purpose against creditors, it is said, can have no connection with, or tendency to promote, a fraudulent purpose against subsequent purchasers.⁸

5. 2 Min. Insts. 694; 2 Lom. Dig. 453; Burrell's Case, 6 Co. 92a, 92b.

6. Va. Code, 1904, § 2458. See American Net, etc., Co. v. Mayo, 97 Va. 182, 33 S. E. 523; Anderson v. Mossy Creek, etc., Co., 100 Va. 420, 41 S. E. 854; Flook v. Armentrout, 100 Va. 638, 42 S. E. 686. According to the construction of the English statute, it is not needful that the subsequent purchaser should be *without notice* of the fraudulent conveyance; for, it is said, it would be only notice of a *void thing*, and that, moreover, the statute, by its terms, requires such a construction. But the purchaser must always be a *purchaser for value*. 2 Min. Insts. 694; 2 Lom. Dig. 453; Gooch's Case, 5 Co. 60 b; Doe v. Manning, 9 East. 59; Evelyn v. Templar, 2 Bro. Ch. 148.

7. 2 Min. Insts. 694; 2 Lom. Dig. 459; Clavering v. Clavering, 2 Vern. 473; Villers v. Beaumont, 1 Vern. 100; Bolton v. Bolton, 3 Swanst. 414, note.

8. 2 Min. Insts. 696; 2 Lom. Dig. 456, 457; Bank of Alexandria v. Patton, 1 Rob. (Va.) 499, 539, 540.
(1282)

A mortgagee is a purchaser for value, and so is a creditor secured by deed of trust, or rather the trustee therein, and so also, is a creditor to whom a conveyance is made in payment or satisfaction of a *pre-existing* debt; and either, therefore, may avoid a prior fraudulent conveyance.⁹ But one who buys at a judicial sale made for the benefit of a creditor, is not a *purchaser* under the statute, but simply succeeds to the rights of the creditor.¹⁰

The consideration of marriage always is *valuable*, at least as to the consort and the children of the marriage; and so, when marriage supervenes, even though after the execution of the subsequent conveyance, it is sufficient at common law to establish it as a conveyance *for value*, and to render a prior fraudulent deed void as to it.¹¹

And as it is declared by the statute that its provisions shall not affect the title of a purchaser for valuable consideration, unless it appear that he *had notice* of the fraudulent intent of his immediate grantor, or of the fraud rendering void the title of such grantor, a consideration of marriage, accompanying the settlement, or following after it, will give the settlement priority over any subsequent conveyance, unless the party had notice of the fraudulent intent of the grantor, etc.¹²

9. Ante, §§ 595, 1171; 2 Min. Insts. 696; 2 Lom. Dig. 457, 458; Chapman v. Emery, Cowp. 279; Wickham v. Lewis Martin & Co., 13 Gratt. 427, 437; Evans v. Greenhow, 15 Gratt. 153; Cammack v. Soran, 30 Gratt. 297.

10. 2 Min. Insts. 697; 2 Lom. Dig. 458; Jackson v. Hans, 15 Johns. (N. Y.) 261; Jones v. Crawford, 1 McMull. (Tenn.) 373; Ridgway v. Underwood, 4 Wash. (U. S. C. C.) 129. But see 2 White & Tud. Lead. Cas. Eq. 93, 94, and cases cited.

11. Post, § 1181; 2 Min. Insts. 684, et seq., 697; 2 Lom. Dig. 458, 461; Herring v. Wickham, 29 Gratt. (Va.) 628, 636, 26 Am. Rep. 405; Bumgardner v. Harris, 92 Va. 188, 23 S. E. 229.

12. 2 Min. Insts. 697; 2 Lom. Dig. 461; Magniac v. Thompson, 7 Pet. 393; Huston v. Cantrill, 11 Leigh (Va.) 136, 176; Bentley v. Harris, 2 Gratt. (Va.) 363; Welles v. Coles, 6 Gratt. 645; Herring v. Wickham, 29 Gratt. 633, 26 Am. Rep. 405; Triplett v. Romine, 33 Gratt. 659; Clay v. Walter, 79 Va. 96. This conclusion is unaffected by the Virginia statute of Voluntary Conveyances enacting that "Every gift, conveyance, etc., which is not upon consideration deemed valuable (1283)

Finally, it must be observed that the purchaser protected is the "*complete purchaser*,"—that is, a purchaser who (1) has *paid all the consideration* (not merely *secured* it to be paid) and (2) has *acquired his conveyance* (or at least, in Virginia, the best right to call for it), before he has received notice of the *fraud*.¹³

§ 1173. Same—(V) Circumstances Indicating Fraudulent Intent—Discussion Outlined.

A fraudulent intent concurred in by *both parties*, grantee as well as grantor, always vitiates the conveyance, as indeed the statute expressly declares; *affirmatively*, by pronouncing its nullity, and *negatively*, by providing that it shall not be void if founded on a *valuable consideration*, and the grantee had *no notice* of the fraudulent intent. It should, therefore, be specially observed, that in order that the conveyance may fall within the condemnation of the statute, the *grantee must be privy* to the fraudulent design, and *collude* with the grantor in accomplishing it.¹

It is not necessary, however, to prove positive knowledge on the part of the grantee of the fraudulent intent of the grantor.

in law, or which is upon *consideration of marriage* shall be void as to creditors whose debts shall have been contracted at the time it was made," etc. Va. Code, 1904, § 2459; *Snider v. Grandstaff*, 96 Va. 479, 70 Am. St. Rep. 863, 31 S. E. 647.

13. The subject of the "complete purchaser" is fully discussed hereafter. See post, §§ 1409, 1410. It is to be noted that the Virginia statute giving a lien to the purchaser who has paid *part* of the consideration before receiving notice, applies only in cases where the notice is afforded by a belated *registry*, not where it arises in other ways. See Va. Code, 1904, § 2472.

1. 2 Min. Insts. 677; 2 Lom. Dig. 419, 449; *Briscoe v. Clark*, 1 Rand. (Va.) 213; *Garland v. Rives*, 4 Rand. 282, 15 Am. Dec. 756; *Herring v. Wickham*, 29 Gratt. (Va.) 631, 26 Am. Rep. 405; *Henderson v. Hutton*, 26 Gratt. 926; *Hickman v. Trout*, 83 Va. 491, 3 S. E. 131; *Rixey v. Deitrick*, 85 Va. 45, 6 S. E. 615; *Paul v. Baugh*, 85 Va. 958, 9 S. E. 329; *Slater v. Moore*, 86 Va. 31, 9 S. E. 419; *Hazlewood v. Forrer*, 94 Va. 703, 27 S. E. 507; *American Net, etc., Co. v. Mayo*, 97 Va. 182, 33 S. E. 523. See *State v. Mason*, 112 Mo. 374, 34 Am. St. Rep. 395, note. (1284)

It suffices to show that the grantee had knowledge of facts and circumstances which were naturally and justly calculated to excite suspicion in the mind of a person of ordinary care and prudence, and would prompt him to inquire into the transaction, which inquiry would necessarily lead to the discovery of the incriminating facts.²

The circumstances indicative of fraud are, of course, very various, the perpetrators being usually astute to conceal it. In general, the evidence of fraud must be *circumstantial*, and can seldom be direct, and yet in one way or another the proof must be sufficient to satisfy the conscience of the court of the commission of the fraud; the omission of the party implicated in the fraud to testify and explain the suspicious circumstances attending the transaction being a circumstance of great weight against him.³

It is also to be observed that, while the burden of proof of the fraud is in general primarily upon him who alleges it, the burden is shifted to those who try to uphold the transaction as soon as a *prima facie* case has been made out by clear proof of the *indicia* of fraud.⁴

A conveyance not fraudulent in its *inception* cannot become so by matters *subsequent*, for the statute requires that the act *should be done* with the criminal intent. But still, if it be after-

2. *Ferguson v. Daughtrey*, 94 Va. 308, 26 S. E. 822; *Hazlewood v. Forrer*, 94 Va. 703, 27 S. E. 507; *American Net, etc., Co. v. Mayo*, 97 Va. 195, 33 S. E. 523. The privity of the grantee in his grantor's fraud is sufficiently charged by alleging that the deed was made with intent to hinder, delay and defraud the creditors of the grantor. It is not necessary to charge expressly that the grantee had *notice* of the fraud. *American Net, etc., Co. v. Mayo*, *supra*.

3. 2 Min. Insts. 677, 678; *Moore v. Ullman*, 80 Va. 310; *Todd v. Sykes*, 97 Va. 143, 33 S. E. 517; *Bowden v. Johnson*, 107 U. S. 251; *Harrisonburg Co. v. Nat. Fur. Co.*, 106 Va. 302, 55 S. E. 679; *Breeden v. Peale*, 106 Va. 39, 55 S. E. 2.

4. 2 Min. Insts. 678; *Hickman v. Trout*, 83 Va. 490, 3 S. E. 131; *Todd v. Sykes*, 97 Va. 143, 33 S. E. 517; *American Net, etc., Co. v. Mayo*, 97 Va. 187, 33 S. E. 523.

(1285)

wards employed for a fraudulent purpose, a court of equity will interpose to prevent such a use of it.⁵

As a final preliminary remark, it may be noted that in order that a creditor may attack an assignment for fraud, it is not essential that he should have been omitted from the deed or should have failed to be secured thereby. On the contrary, even though he be secured in the deed, together with other creditors whose debts are fraudulent, if the property be not sufficient to pay all, he is at liberty, while claiming under the deed, to assail the validity of such other *fraudulent* debts. His attitude as a *purchaser* under the deed does not impair his right to attack such debts as fraudulent or otherwise void, for the statute avoids the instrument, if made with intent to hinder, delay or defraud creditors, *purchasers* or other persons, as to the persons so defrauded.⁶

In examining the *indicia* of fraud, we shall consider: (1) The general badges of fraud; (2) The retaining of possession and control by the grantor; (3) Effect of clause releasing grantor from further liability for the debts secured; (4) Preferences of creditors; (5) Fraudulent intent directed against other creditors than those attacking the deed.

§ 1174. Same—1. General Badges of Fraud.

In *Hickman v. Trout*,¹ the court has given quite a full, though by no means exhaustive, enumeration of the *usual badges of fraud*, which it is not amiss to transcribe, namely, gross inadequacy of price; no security taken for the purchase money; unusual length of credit; bonds taken payable at long periods; conveyance purporting to be made in satisfaction of alleged antecedent indebtedness of father to son, they continuing to reside together; threats and pendency of suits; concealment of the transaction; keeping the conveyance a considerable time, unacknowledged and unregistered; grantor remaining in possession as

5. 2 Min. Insts. 678; 2 Lom. Dig. 420; *Claytor v. Anthony*, 6 Rand. (Va.) 306, 307.

6. *Runkle v. Runkle*, 98 Va. 666, 667, 37 S. E. 279.

1. 83 Va. 491, 3 S. E. 131.
(1286)

before the conveyance; absence of itemized accounts, and of vouchers; contradiction in the statements of the grantor and grantee; want of means by the grantor to create the alleged indebtedness; and failure to examine as witnesses, persons who have had opportunity to know the facts. Any of these facts may make a case of *prima facie* fraud which will call upon the parties for an explanation, and all combined will generally suffice to establish the fraudulent character of the transaction, as to all the parties.²

And in *Click v. Green*,³ it was held that a conveyance of *all his property* by a father heavily indebted and apprehensive of additional liability by the decisions of a suit against him for damages, to a son, for an improbable cash payment, and deferred payments *without interest*, extending through *fifteen years*, accompanied by an agreement on the son's part, to provide maintenance for his father and mother during their lives, presents a case which, without satisfactory explanation, is indicative of a fraudulent intent to hinder and delay creditors; and especially when the son, who might afford the necessary explanation, is *not examined* as a witness in the case.

The statute invalidates the conveyance if the intent be to *hinder* or *delay* creditors, etc., as well as where the intention is absolutely to *defraud* them of their rights altogether. Hence, it is sometimes declared that an *unreasonable postponement* of the time of sale under a deed of trust or assignment for the benefit of creditors, and a corresponding postponement of the payment of the debts secured, as for ten years, or even for three (but not

2. 2 Min. Insts. 678. In *Paul v. Baugh*, 85 Va. 955, 9 S. E. 329, the court enumerates certain other circumstances, which are *not* necessarily to be deemed badges of fraud, namely; that the debtor, pending actions against him, threatens to protect himself if they are pressed, and to make an assignment postponing the claims of the suing creditors; that the bonds of the preferred creditors are antedated without their knowledge; that the grantor is to retain possession and take the profits until such bonds mature (that is, for eleven months after the assignment); that the grantor secures the debt of the suing creditor on condition of the release of one-half thereof, etc.

3. 77 Va. 827.

(1287)

for two), would avoid the deed.⁴ But there seems much reason to consider that no postponement of the sale *could* operate a fraud or delay upon other creditors, since they might proceed at once to subject to their debts by a proceeding in equity, if not at law, whatever interest the grantor had reserved.⁵

§ 1175. Same—2. The Reservation of Possession, Control, or Benefits by the Grantor.

While the retention, by the grantor in a deed of assignment, of the *possession* of the property is a suspicious circumstance, it may be provided for in the conveyance itself, and be consistent with its terms and objects, in which case the suspicion which it engenders is at least mitigated; and it will be also perceived that, as in the case of *lands*, possession is not the principal *indicium* of ownership, so it does not excite the same degree of mistrust if the grantor retains them, as it does in the case of *chattels*.¹

In the case of a deed of assignment by an insolvent debtor for the benefit of his creditors, purporting to be an assignment of *all* his property, to reserve any benefit to the *grantor* himself, or to introduce limitations and contingencies such as will give him *control* over the property or its proceeds or profits, so as to enable him in effect to *defeat the conveyance*;² to reserve the

4. 2 Min. Insts. 679; 2 Lom. Dig. 422; *Garland v. Rives*, 4 Rand. (Va.) 282, 15 Am. Dec. 756; *Lewis v. Caperton*, 8 Gratt. (Va.) 148; *Cochran v. Paris*, 11 Gratt. 348; *Dance v. Seaman*, 11 Gratt. 781, 782. See *Catt v. Knabe Mfg. Co.*, 93 Va. 740, 26 S. E. 246; *Breedon v. Peale*, 106 Va. 39, 55 S. E. 2.

5. 2 Min. Insts. 679; *Skipwith v. Cunningham*, 8 Leigh (Va.) 271, 31 Am. Dec. 642; *Lewis v. Caperton*, 8 Gratt. (Va.) 148; *Cochran v. Paris*, 11 Gratt. 348; *Dance v. Seaman*, 11 Gratt. 781; *Marks v. Hill*, 15 Gratt. 420; *Sipe v. Earman*, 26 Gratt. 566, 569. See *Breedon v. Peale*, 106 Va. 39, 55 S. E. 2.

1. 2 Min. Insts. 679; 2 Lom. Dig. 421; *Charlton v. Gardner*, 11 Leigh (Va.) 281; *Davis v. Turner*, 4 Gratt. (Va.) 422; *Paul v. Baugh*, 85 Va. 955, 3 S. E. 329; *Benjamin v. Madden*, 94 Va. 66, 26 S. E. 392; *Hughes v. Epling*, 93 Va. 424, 25 S. E. 105.

2. 2 Min. Insts. 680; *Didier v. Patterson*, 93 Va. 534, 25 S. E. 661; *Catt v. Knabe Mfg. Co.*, 93 Va. 740, 26 S. E. 246; *Hurst v. Leckie*, 97 (1288)

power to revoke the conveyance; to select, as trustee, one disqualified by illness, mental infirmity, or distance; to stipulate for the maintenance of the grantor or his family, or for his employment at a fixed salary; all these will render the assignment fraudulent.³

§ 1176. Same—3. Effect of Clause in Assignment Releasing Grantor from Further Liability upon His Debts.

It does not, at common law nor in Virginia, vitiate the assignment to incorporate also a proviso that the creditors who avail themselves of the deed shall *release* so much of their debts as are not satisfied by its proceeds; that is, supposing the *whole* of the grantor's property is conveyed.¹

But the debtor is permitted to *except* from the deed such property as is exempt from seizure by his creditors and the exemption laws; and if the *deed passes title* to all his other property to the trustee, and contains a release clause, it is not invalidated by the failure of the debtor actually to deliver to the trustee some of the property embraced by the deed; since, the title of the property being vested in the trustee, with the right to immediate possession, the trustee can at any time recover it by legal process from the debtor or other person holding it.²

Such a release clause, however, though the provisions of the

Va. 550, 75 Am. St. Rep. 798, 34 S. E. 564; *Lang v. Lee*, 3 Rand. (Va.) 410; *Janney v. Barnes*, 11 Leigh (Va.) 100; *Sheppard v. Turpin*, 3 Gratt. (Va.) 374; *Spence v. Bagwell*, 6 Gratt. 444; *Addington v. Etheridge*, 12 Gratt. 436; *Rucker v. Moss*, 84 Va. 634, 5 S. E. 527.

3. 2 Min. Insts. 680; 2 Lom. Dig. 424, 425; *Hurst v. Leckie*, 97 Va. 550, 75 Am. St. Rep. 798, 34 S. E. 564.

1. 2 Min. Insts. 681; 2 Lom. Dig. 25, et seq.; *Skipwith v. Cunningham*, 8 Leigh (Va.) 272, 31 Am. Dec. 642; *Kevan v. Branch*, 1 Gratt. (Va.) 274; *Phippin v. Durham*, 8 Gratt. 457; *Long v. Meriden Britannia Co.*, 94 Va. 594, 27 S. E. 499; *Hurst v. Leckie*, 97 Va. 560, 75 Am. St. Rep. 798, 34 S. E. 564; *Joel B. Davis Co. v. Augustus*, 105 Va. 843, 54 S. E. 985.

2. *Hurst v. Leckie*, 97 Va. 550, 75 Am. St. Rep. 798, 34 S. E. 564; *Oppenheimer v. Myers*, 99 Va. 582, 39 S. E. 218, 7 Va. Law Reg. 269.

(1289)

deed be assented to by creditors, does not affect the right of the creditor, in the absence of express stipulation, to hold collateral security previously assigned by the debtor to secure his debt. The release operates merely upon the *debtor's personal liability*. It does not extinguish the debt, nor deprive the creditor of any security held for it.³

§ 1177. Same—4. Preferences of Creditors.

Save so far as is prohibited by the Bankruptcy Act of Congress,¹ neither at common law nor in Virginia, is it immoral or illegal to prefer one creditor to another in a deed of assignment (neither having any lien), provided there is no design to secure some fraudulent or illegal pecuniary benefit or advantage therefrom to the debtor himself.² And the fact that the debtor's motive in postponing certain creditors to others is to get even with them for pressing him too hard is immaterial, provided the preferred debts are *bona fide* debts.³

§ 1178. Same—5. Fraudulent Intent Directed against Other Creditors Than Those Attacking the Deed.

An assignment for the benefit of sundry creditors may be void for fraud as to some and valid as to others not intended to be defrauded thereby.¹

Nor is it necessary that each attacking creditor should have to show that there was a direct, conscious intent to defraud him personally, if the general intent to hinder, delay or defraud cred-

3. *Long v. Meriden Britannia Co.*, 94 Va. 594, 27 S. E. 499.

1. Act, July 1, 1898, § 60.

2. 2 Min. Insts. 680, and cases there cited; *Crawford v. Taylor*, 6 Gill & J. (Md.) 323, 26 Am. Dec. 584, note; *Johnson v. Lucas*, 103 Va. 36, 48 S. E. 497; *Long v. Meriden Britannia Co.*, 94 Va. 594, 27 S. E. 499; *Breeden v. Peale*, 106 Va. 39, 55 S. E. 2; *Webb v. Lynchburg Shoe Co.*, 106 Va. 726, 56 S. E. 581.

3. *Paul v. Baugh*, 85 Va. 955, 3 S. E. 329.

1. 2 Min. Insts. 681; 2 Lom. Dig. 427; *Skipwith v. Cunningham*, 8 Leigh (Va.) 272, 31 Am. Dec. 642; *Craig v. Hoge*, 95 Va. 276, 28 S. E. 317.

itors is present; but where the circumstances are such as to constitute an *admission* on the part of a creditor that there was no intent actually to defraud *him*, it seems he will not be permitted to attack the validity of the deed upon that ground.²

§ 1179. Same—(VI) Effect of Conveyance Being Voluntary—Virginia Statute of Voluntary Conveyances.

Independently of statute, the courts have always been disposed to attach considerable weight, as establishing a presumption of *actual fraudulent intent*, to the fact that a conveyance is without consideration,—at least, where *creditors* are concerned, and especially in case of *prior* or *existing* creditors, that is, creditors whose debts were already contracted at the time of such voluntary conveyance.

In regard to the extent and scope of this presumption of fraudulent intent, derived from the mere want of consideration for the deed,—as whether it raises a presumption of an intent to defraud *all* creditors, subsequent as well as prior, or *only prior* creditors, and whether the presumption may be rebutted by showing that the donor has *retained an ample remnant* of estate, sufficient to meet all *existing demands*, etc.,—the courts of different jurisdictions, and sometimes in the same jurisdiction, have differed quite widely.¹

But these vexed questions have in large measure been set at rest in Virginia by the “statute of Voluntary Conveyances,”² which enacts as follows:

2. See *Bumgardner v. Harris*, 92 Va. 188, 23 S. E. 229; *Runkle v. Runkle*, 98 Va. 666, 37 S. E. 274; ante, § 1173. In the former case it was held that, where one set of creditors attacked a deed for *actual fraud*, and another set attacked it because it was *voluntary*, but not within the proper time (that is, five years from the accrual of the right to avoid it), and the deed was found to be both *voluntary* and *fraudulent*, the creditors who relied on the *actual fraud* could take advantage thereof, but the deed was sustained against those who merely alleged it to be *voluntary*, the defense of the statute of limitations being good as against the latter. Va. Code, 1904, § 2929.

1. See 2 Min. Insts. 681, et seq., and cases cited.

2. Va. Code, 1904, § 2459.

(1291)

"Every gift, conveyance, assignment, transfer or charge, which is not upon consideration deemed *valuable in law*, or which is upon consideration of *marriage*, shall be void as to *existing creditors*, whose debts shall have been contracted at the time it was made, but shall not, *on that account merely*, be void as to *creditors* whose debts shall have been contracted, or as to *purchasers* who shall have purchased, *after it was made*; and though it be deemed to be void as to a *prior creditor*, because voluntary or upon consideration of marriage, it shall not, *for that cause*, be decreed to be void as to *subsequent creditors* or purchasers."

In Virginia, therefore, the effect of a *voluntary* conveyance, in the absence of evidence of an *actual fraudulent intent*, is to render the deed in general fraudulent and void as to existing or prior creditors, but it is good (there being no actual fraud) as to subsequent creditors and purchasers. But the fact that the deed is voluntary, if the donor is indebted at the time, raises a *prima facie* presumption that it is fraudulent as to *subsequent creditors*; though that presumption may be repelled by showing that the existing debts were *charged* on the property given, and only the *surplus* bestowed on the donee, or by showing that the donor retained in his hands a remnant of estate *amply sufficient* to meet the existing demands against him without any *definite improbability* that it will be so applied. And on the other hand it is established that if the donor be *not indebted* at the date of the voluntary conveyance, that affords a presumption that there is no fraud in the gift, a presumption which may be repelled, however, by showing that the donor immediately contracted a large amount of indebtedness, or by any other proof that he designed to defraud the subsequent creditors.³

Under the language of the statute just quoted, the right of *existing creditors* to set aside the voluntary conveyance would seem to be entirely independent of the question whether the donor has retained sufficient to satisfy all existing demands, no attention being given by the statute to the *proportion* of his es-

3. 2 Min. Insts. 682, 683; *Richardson v. Pierce*, 105 Va. 632, 54 S. E. 480.

(1292)

tate that is thus given away. But it has been held, or assumed, by the Virginia court that a voluntary conveyance, if founded on a *good consideration* (though *not valuable*) is *not per se void* as to existing creditors, but is only *prima facie* so, and the burden of proof is on those claiming under it to show its validity; and that if the grantor retained ample and sufficient property to pay all his lawful and just debts, the conveyance is not void.⁴ But this decision seems to have been discredited, if not tacitly overruled, by later decisions.⁵

The suit to avoid a voluntary deed, if brought merely because the deed is *voluntary* or upon *consideration of marriage* and not because of any *actual* fraudulent intent, must be brought within *five years* from the time the right to avoid the same has accrued.⁶

§ 1180. Same—(VII) Instances of Considerations Deemed Valuable in Law.

The fact that a conveyance is founded on valuable consideration is attended with two important results, namely, (1) that it is a defense to a suit to avoid a conveyance for *actual fraud*, if the defendant can show that he is a purchaser *for value* and *without notice*; and (2) that it is a defense to a suit to annul the conveyance merely because it is *voluntary*. In such cases therefore the constant endeavor is to find in the transaction something which may amount to such valuable consideration, wherever there is any pretext to do so.¹

Furthermore, if the value of the consideration is materially

4. *Taylor v. Mallory*, 96 Va. 18, 30 S. E. 472.

5. *Davis v. Anderson*, 99 Va. 622, et seq., 39 S. E. 588; *Richardson v. Pierce*, 105 Va. 631, 632, 54 S. E. 480.

6. Va. Code, 1904, § 2929. See *Vashon v. Barrett*, 99 Va. 344, 38 S. E. 200, 7 Va. Law Reg. 36, note; 1 Va. Law Reg. 596. This limitation does not apply to *devises* and *legacies*, but only to voluntary gifts *inter vivos*, *Lewis v. Overby*, 31 Gratt. (Va.) 616, et seq., nor to cases of actual fraud, 2 Min. Insts. 683, 684; *Bumgardner v. Harris*, 92 Va. 188, 23 S. E. 299; *Snoddy v. Haskins*, 12 Gratt. 368; *Wilson v. Buchanan*, 7 Gratt. 343; *Huston v. Cantril*, 11 Leigh (Va.) 149.

1. 2 Min. Insts. 684.

short of the value of the property conveyed, and there is *no actual fraud*, equity is accustomed to treat the conveyance as *pro tanto* voluntary, that is, it treats the conveyance as voluntary so far as the property *exceeds* the value of the consideration, allowing the conveyance to stand as security for the actual value of the consideration.²

The several instances of valuable consideration now to be examined are (1) Marriage as a valuable consideration; (2) The relinquishment by a wife of her dower interest or other property rights.

§ 1181. Same—1. Marriage as a Valuable Consideration.

At common law, *marriage* has always been deemed an eminently valuable consideration, so that property granted to the prospective consort before and in contemplation of marriage has always been regarded as constituting the grantee a *purchaser for value*.¹

Whether the consideration of marriage can extend beyond the husband and wife, and their issue, as, for example, to the *brothers* of either consort, has provoked considerable diversity of opinion. In England the prevailing sentiment is believed to favor its extension to collaterals.²

But in the United States, it seems now to be clearly established that *collaterals* are not entitled to claim the marriage as constituting, in respect to them, a valuable consideration;³ and

2. 2 Min. Insts. 684; *Henderson v. Hunton*, 26 Gratt. (Va.) 934.

1. 2 Min. Insts. 684, 685; *Bumgardner v. Harris*, 92 Va. 188, 23 S. E. 229; *Moore v. Butler*, 90 Va. 683, 19 S. E. 850; *Herring v. Wickham*, 29 Gratt. (Va.) 628, 636, 26 Am. Rep. 405; *Triplett v. Romine*, 33 Gratt. 655, et seq.; *Clay v. Walter*, 79 Va. 96, et seq.; *Magniac v. Thompson*, 7 Pet. 348; *Wheeler v. Caryl*, 1 Ambl. 121. See 1 Va. Law Reg. 590.

2. 2 Min. Insts. 685; 2 Lom. Dig. 439; Fry, Specif. Perf., § 108, et seq.; *Goring v. Nash*, 3 Atk. 186; *Edwards v. Countess of Warwick*, 2 P. Wms. 171; *Vernon v. Vernon*, 2 P. Wms. 594, 1 Bro. P. C., 267; *Stephens v. Trueman*, 1 Ves. Sr. 73; *Pulvertoft v. Pulvertoft*, 18 Ves. 84, 92.

3. 2 Min. Insts. 685; Fry, Specif. Perf., § 111, n. (3); *Buford v.* (1294)

in Virginia this doctrine has been repeatedly announced and insisted on. Thus, whilst the consideration of marriage was allowed to support a marriage settlement in favor of bastard children of the father, whom the marriage and his acknowledgment had legitimated,⁴ it was held that the consideration did not extend to the child of the husband by a previous marriage, so as to give validity to a settlement of the wife's property on such child, as against the wife's ante-nuptial creditors.⁵

But in case of a settlement made upon the consort, etc., after marriage (a *post-nuptial* settlement, it is usually termed), the marriage is not a valuable consideration, for a *past* consideration is equivalent to no consideration at all. Hence, if there be no consideration to support it other than the fact of an already existing marriage, such a settlement is *voluntary*, and the grantee is not a purchaser for value.⁶ Indeed, in Virginia at least, a post-nuptial settlement upon the wife by an *insolvent* husband is *ipso facto* presumed to be voluntary, and the burden of rebutting this presumption rests upon those seeking to establish the validity of the settlement.⁷ Furthermore, in a contest between

McKee, 1 Dana (Ky.) 107; Hayes v. Kershaw, 1 Sandf. Ch. (N. Y.) 258.

4. Herring v. Wickham, 29 Gratt. (Va.) 628, 26 Am. Rep. 405.

5. 2 Min. Insts. 685, 686; Triplett v. Romine, 33 Gratt. 658, 659; Bumgardner v. Harris, 92 Va. 187, 23 S. E. 229. There is a reasonable distinction, admitted, even in England, between the case where collaterals provided for by marriage settlement are seeking to enforce their claims as against the *heirs or devisees* of the settlor, and where they are claiming against *creditors* of the settlor, or *subsequent purchasers for value* from him. As against the heirs or devisees of the settlor, the collaterals are allowed to claim by a much more unanimous assent than as against creditors of the settlor, and purchasers from him for value. 2 Min. Insts. 686; Goring v. Nash, 3 Atk. 136, 188; Davenport v. Bishopp, 1 Phillips, 698, 704-'5; Johnson v. Legard, 6 M. & S. 60, 1 Tur. & Rus., 281; Smith v. Cherrill, L. R. 4 Eq. 389; Triplett v. Romine, 33 Gratt. (Va.) 658.

6. 2 Min. Insts. 686.

7. Robbins v. Armstrong, 84 Va. 810, 6 S. E. 130; Rixey v. Deitrick, 85 Va. 42, 6 S. E. 615; De Farges v. Ryland, 87 Va. 404, 24 Am. St. Rep. 659, 12 S. E. 805; Flynn v. Jackson, 93 Va. 341, 342, 25 S. E. 1; Massey (1295)

2 Min. Real Prop—17

the creditors of an *insolvent* husband and the wife, touching an alleged purchase by the wife from the husband, or from others with means furnished by him, the transaction is *prima facie* presumed to be *actually fraudulent*, and the burden is upon the wife or those claiming under her to repel the presumption and to show, by clear and satisfactory evidence, that the consideration was paid by her *bona fide* out of her separate estate or, in case of a settlement, that the husband retained ample assets to satisfy his existing creditors.⁸ But if the husband is *not indebted* at the time of the transaction, no such presumption arises, and the burden is on the subsequent creditor to show that prospective fraud was contemplated and directed against him.⁹

So, if the only consideration for a deed to the wife is a debt due by the grantor's ancestor to the husband, the deed is in effect a gift of the land by her husband to her, and as such is voluntary and void as against the husband's then existing creditors.¹⁰

The present Virginia statute of "Voluntary Conveyances"¹¹ places an *ante-nuptial* settlement, or conveyance in consideration of *marriage*, upon the same footing as a *voluntary* conveyance, so far as concerns the right of *existing creditors* to set it aside or the *prima facie* presumption of fraud against *subsequent creditors* arising therefrom, in case the donor is indebted at the

v. Yancey, 90 Va. 626, 19 S. E. 184; *Kinnier v. Woodson*, 94 Va. 711, 27 S. E. 457; *Spence v. Repass*, 94 Va. 716, 27 S. E. 583; *McConville v. Bank*, 98 Va. 9, 34 S. E. 891; *Richardson v. Pierce*, 105 Va. 628, 54 S. E. 480.

8. *Lewis v. Palmer*, 106 Va. 522, 56 S. E. 341; *Richardson v. Pierce*, 105 Va. 628, 54 S. E. 480; *Kline v. Kline*, 103 Va. 265, 48 S. E. 882; *Rankin v. Goodwin*, 103 Va. 81, 48 S. E. 521; *Lea v. Willis*, 101 Va. 188, 43 S. E. 354; *Robinson v. Bass*, 100 Va. 190, 40 S. E. 660; *Crowder v. Garber*, 97 Va. 565, 34 S. E. 470; *Spence v. Repass*, 94 Va. 716, 27 S. E. 583; *Stonebraker v. Hicks*, 94 Va. 618, 27 S. E. 497; *Runkle v. Runkle*, 98 Va. 663, 37 S. E. 279.

9. *Richardson v. Pierce*, 105 Va. 628, 54 S. E. 480.

10. *Cramer v. Senger*, 107 Va. 400, 59 S. E. 375.

11. Va. Code, 1904, § 2459.

date of the conveyance or settlement.¹² But it leaves untouched the common law principles above described, as applied to other cases wherein it may become necessary to determine whether the grantee in such an instrument is a *purchaser for value*, as, where, upon a charge that a conveyance is actually fraudulent and void under the statute of Fraudulent Conveyances, the defendant (without notice of the fraud) claims to be a purchaser *for value*. In such case, the fact that the defendant acquired the property in question in consideration of marriage is a good defense; and so, in any other case where the fact that the defendant is a *purchaser for value* is to be used as a defense.¹³

§ 1182. Same—2. Wife's Relinquishment of Her Dower or Other Property Rights as a Valuable Consideration.

A *post-nuptial* settlement upon the wife was, even at common law, deemed a voluntary conveyance, unless supported by some consideration other than marriage.¹

This consideration might be supplied on the part of the wife by the relinquishment of her contingent right of dower, to which she is in general entitled paramount to her husband's creditors, or to any disposition which it is in his sole power to make of it during the coverture. And if she make such relinquishment upon her husband's *promise* to make a settlement upon her, and afterwards he fulfill his promise, the settlement will be valid against all creditors who have not meanwhile obtained specific liens, by judgment or otherwise, upon the property conveyed therein. But where the settlement is not contemporaneous with the relinquishment, *clear proof* must be furnished of such prior contract between the husband and wife, and the *recital* of it in the settlement itself is by no means sufficient for the purpose. On the other hand, a *mere promise* of the wife to unite with her husband, when requested, in future conveyances of his lands,

¹² Ante, § 1179, note 3; 2 Min. Insts. 682, 683; *Richardson v. Pierce*, 105 Va. 632, 54 S. E. 480.

¹³ *Snyder v. Grandstaff*, 96 Va. 479, 70 Am. St. Rep. 863, 31 S. E. 647.

¹ Ante, § 1181.

so as thereby to relinquish her dower therein, is *no consideration*, for the wife's promise is *void*.²

The fact that the dower interest relinquished is less considerable than the amount settled does not, *at law*, vitiate the conveyance; the *law courts* do not regard any disparity of value, except in so far as being merely *nominal*, it may suffice to establish a fraudulent intent, and they treat the conveyance as wholly good or wholly bad. The courts of *equity*, however, exercise a discrimination, and whilst an excess of value in the settlement of a few dollars would be disregarded, yet if it be considerable, equity may, and often does, treat the surplus of the settlement as merely *voluntary*; and, therefore, considers the deed as creating a *trust* for the wife to the value of the *dower* released, and for the *creditors* as to the residue.³

But the wife may, in general, elect to relinquish the settlement altogether, and to be restored to her antecedent claim to

2. 2 Min. Insts. 686, 687; 2 Lom. Dig. 437; *Land v. Shipp*, 98 Va. 284, 50 L. R. A. 560; *Quarles v. Lacey*, 4 Munf. (Va.) 251; *Gosden v. Tucker*, 6 Munf. 1; *Blanton v. Taylor*, Gilm. (Va.) 210; *Harvey v. Alexander*, 1 Rand. (Va.) 237, 10 Am. Dec. 519; *Taylor v. Moore*, 2 Rand. 563; *Blow v. Maynard*, 2 Leigh (Va.) 29; *Lee v. Bank of U. S.*, 9 Leigh, 200; *Harrison v. Carroll*, 11 Leigh, 484; *Lewis v. Caperton*, 8 Gratt. (Va.) 166; *Sykes v. Chadwick*, 18 Wall. 146, 147. It has also been made a question whether a relinquishment of a contingent right of dower, where there is *no complete alienation* of the estate by the husband, but a *mere incumbrance* is created to secure a debt, constitutes a sufficient consideration for a settlement on the wife, inasmuch as the husband, by discharging the debt, would be re-invested with his whole estate, in which the wife would have her dower as before. And yet the wife's relinquishment is a *present consideration*, and the husband's reinstatement in his original interest is, in fact, no more than the acquisition of a new estate. See *Lewis v. Caperton*, *supra*; 2 Min. Insts. 687.

3. 2 Min. Insts. 687; 2 Lom. Dig. 437; *Hopkirk v. Randolph*, 2 Brock. (U. S. C. C.) 133; *Wright v. Stanard*, 2 Brock. 312; *Sykes v. Chadwick*, 18 Wall. 146; *Davis v. Davis*, 25 Gratt. (Va.) 590; *William & M. College v. Powell*, 12 Gratt. 386; *Burwell v. Lumsden*, 24 Gratt. 446, 18 Am. Rep. 648; *Henderson v. Hunton*, 26 Gratt. 934; *Runkle v. Runkle*, 98 Va. 663, 37 S. E. 279.

(1298)

dower, if the rights of innocent purchasers will not be thereby compromised.⁴

And so, the relinquishment by the wife of other property rights,⁵ or in case of a *separation*, the wife's releasing the husband from obligation for her support and maintenance,⁶ may constitute a valuable consideration to support a post-nuptial settlement.

§ 1183. Same—(VIII) Proof of Fraud Unavailing against a Purchaser for Value and without Notice of the Fraud.

The Virginia statute of Fraudulent Conveyances¹ expressly declares that the title of a grantee *for valuable consideration* is not to be affected thereby, unless it appear that he had *notice* of the fraudulent intent of his *immediate grantor* or of the fraud rendering *void* the *title of such grantor*.²

To maintain the defence of a purchase for value without notice, the alienee must aver and prove that he is a "*complete purchaser*," which involves the following essentials, viz.: (1), That he is a purchaser for *valuable consideration*; (2), That the consideration has been *actually paid* or supplied; (3), That he *has received*, or is *best entitled* to receive, the conveyance of the *legal title* to the property; and (4), That these essentials all concurred before he had notice of the adverse claim. And the burden of proving the first three of these essentials rests on the purchaser, whilst to affect the latter with *notice* of the adverse claim devolves upon the claimant.³

4. 2 Min. Insts. 687, 688; *Davis v. Davis*, 25 Gratt. (Va.) 595, 596. See ante, § 325, et seq.

5. 2 Min. Insts. 688; *Browning v. Headley*, 2 Rob. (Va.) 340, 40 Am. Dec. 755; *Poindexter v. Jeffries*, 15 Gratt. (Va.) 368; *Penn v. Spencer*, 17 Gratt. 92, 91 Am. Dec. 375; *Smith v. Bradford*, 76 Va. 764.

6. 2 Min. Insts. 688, 689.

1. Va. Code, 1904, § 2458.

2. Va. Code, 1904, § 2458; ante, § 1173.

3. 2 Min. Insts. 689; *Lamar v. Hale*, 79 Va. 147. See *Breeden v. Peale*, 106 Va. 39, 55 S. E. 2. The doctrine of the "complete purchaser" is quite fully discussed in connection with the topic of registry. See post, §§ 1409, 1410.

§ 1184. V. Considerations Involving Mistake or Misapprehension—Discussion Outlined.

In cases of plain mistake or misapprehension, though not the effect of fraud or contrivance, *equity* will *rescind* the conveyance, if the error goes essentially to the *substance* of the contract, so that the purchaser does not get what he bargained for, or the vendor sells that which he did not design to sell; or if the circumstances do not demand the total *rescission* of the contract, the court will give relief by adjusting a *compensation* between the parties.¹

The distinction chiefly to be here noted is between mistakes of *law* and mistakes of *fact*.

§ 1185. (I) Considerations Involving Mistakes of Law.

The general doctrine is that ignorance or mistake of the *law* does not affect contracts or conveyances. If they are entered into *in good faith*, and are free from misapprehension as to *facts*, although under a mistake of the law, they are for the most part valid.¹

In respect, however, to the vendor's or vendee's ignorance in law of the *title* he proposes to convey or to acquire, a number of cases, both in England and in Virginia, establish that, notwithstanding the general doctrine, and although there may not appear to be any fraud, a court of equity will not refuse to give relief under circumstances, by either rescinding the contract

1. 2 Min. Insts. 699; 2 Lom. Dig. 409; *Alexander v. Newton*, 2 Gratt. (Va.) 266; *Irick v. Fulton*, 3 Gratt. 193; *Shepherd v. Henderson*, 3 Gratt. 367; *Lea v. Eidson*, 9 Gratt. 277; *French v. Townes*, 10 Gratt. 513; *Gaw v. Huffman*, 12 Gratt. 628. The student should note that in cases of trust, of mistake, of fraud, or contract, equity may entertain jurisdiction wherever the *person* is found within the state, although the *lands* lie beyond its limits, *Davis v. Morriss*, 76 Va. 51.

1. 2 Min. Insts. 700; *Zollman v. Moore*, 21 Gratt. (Va.) 313; *Ross v. McLaughlan*, 7 Gratt. 86; *Jennings v. Palmer*, 8 Gratt. 70; *Brown v. Armistead*, 6 Rand. (Va.) 594; *Hunt v. Rousmanier*, 1 Pet. 15; *Bank of U. S. v. Daniel*, 12 Pet. 55.

(1300)

in whole or in part, or by otherwise decreeing compensation to one or other of the parties.²

§ 1186. (II) Considerations Involving Mistake of Fact.

Where an act is done or a conveyance executed under a mistake or ignorance of *matter of fact*, material to the transaction, and an efficient inducement thereto, the general rule is, that a court of equity will relieve by setting the conveyance or act aside. Thus, if A buys land of B, to which B is supposed to have a good title, and it turns out that, in consequence of facts unknown alike to both parties, he has no title at all, equity will cancel the transaction, and cause the purchase-money to be restored to A, putting both parties *in statu quo*.¹ The mistake, however, must be made out by the clearest and most satisfactory testimony, the burden of proof being on the complainant.²

Where there is a material mistake in the substance of the thing contracted for, so that the purchaser does not get substantially what he bargained for, and the seller parts with what he had no idea of selling, the contract or conveyance ought to be vacated. To hold otherwise would be to make a contract for parties, rather than to enforce one.³

2. 2 Min. Insts. 700; 2 Lom. Dig. 410; 1 Story, Eq. Jur., §§ 120. et seq., 126, n. (1); *Bingham v. Bingham*, 1 Ves. Sr. 126; *Lansdowne v. Lansdowne*, 2 Jac. & Walk. 205; *Hunt v. Rousmanier*, 8 Wheat. 214, 1 Pet. 15, 16; *Pullen v. Mullen*, 12 Leigh (Va.) 434; *Irick v. Fulton*, 3 Gratt. (Va.) 193; *Brown v. Rice*, 26 Gratt. 470, et seq.

1. 2 Min. Insts. 700, 881, et seq.; 2 Lom. Dig. 411, 412; 1 Story, Eq. Jur., § 140, et seq.; *Ross v. McLaughlan*, 7 Gratt. (Va.) 86; *French v. Townes*, 10 Gratt. 513; *Gaw v. Huffman*, 12 Gratt. 628. See post, §§ 1187, 1188.

2. 2 Min. Insts. 701; *Woolam v. Hearn*, 7 Ves. 211, 2 White & Tud. Lead. Cas. Eq. 540, 547, et seq., 558, et seq.; *Henkle v. Assurance Co.*, 1 Ves. Sr. 317; *Shelburn v. Inchiquin*, 1 Bro. Ch. 338, 350; *Finch v. Causey*, 107 Va. 124, 57 S. E. 562; *Carter v. McArtor*, 28 Gratt. (Va.) 360, 361; *Major v. Ficklin*, 85 Va. 737, 8 S. E. 715; *Hudson Iron Co. v. Stockbridge Iron Co.*, 107 Mass. 290; *Gillespie v. Moon*, 2 Johns. Ch. (N. Y.) 595, 630.

3. 2 Min. Insts. 701; 2 Lom. Dig. 412; *Graham v. Hendren*, 5 Munf. (Va.) 185; *Chamberlaine v. Marsh*, 6 Munf. 283, 287; *Tucker v. Cocke*, (1301)

But in respect to *judicial sales*, the maxim *caveat emptor* applies with considerable strictness. The court undertakes to sell only the title, such as it is, of the *parties* to the suit, and the purchaser must ascertain for himself, whether the title is liable to impeachment; and if he has just grounds of objection for want or defect of title, he must present them to the court before the confirmation of the sale. Ordinarily, objections after confirmation, come too late.⁴

§ 1187. Same—Mistake as to Description of Land.

A not infrequent, and a very important inquiry connected with this subject, relates to those cases where contracts for, or conveyances of, lands have fallen into innocent mistakes of description, either in respect of the situation and boundaries, or more frequently of the *quantity*. The general doctrine is that already stated, that if the parties are in error as to the *substantial inducement* to the transaction, it must be relieved against, either by rescinding the contract, or by decreeing compensation. Thus, where a vendor's conveyance in good faith described the land, which was in several tracts, as situated on Paint Creek, whose lands were noted for fertility, whereas in fact but one tract, rather more than *one-fourth* of the whole, was on that

2 Rand. (Va.) 66; Thompson v. Jackson, 3 Rand. 504, 15 Am. Dec. 721; Lamb v. Smith, 6 Rand. 552; Glassell v. Thomas, 3 Leigh (Va.) 125, 129; Irick v. Fulton, 3 Gratt. (Va.) 193; Bailey v. James, 11 Gratt. 468, 62 Am. Dec. 659; Hoover v. Calhoun, 16 Gratt. 109; Mauzy v. Sellars, 26 Gratt. 645, et seq.

4. 2 Min. Insts. 701; Threlkeld v. Campbell, 2 Gratt. (Va.) 198, 44 Am. Dec. 384; Young v. McClung, 9 Gratt. 358; Daniel v. Leitch, 13 Gratt. 212-'13; Watson v. Hoy, 28 Gratt. 698; Long v. Weller, 29 Gratt. 351.

And even when the objection is presented in time, it must be a *mutual mistake after discovered*, of material facts, or a mistake as to such facts, by one party induced by the *fraud* or culpable *negligence* of the other, and not arising from his own negligence. 1 Stor. Eq., §§ 151, 146; 2 Min. Insts. 701; Watson v. Hoy, 28 Gratt. 710-'11; Long v. Weller, *supra*; Hickson v. Rucker, 77 Va. 138; Redd v. Dyer, 83 Va. 335, 5 Am. St. Rep. 272, 2 S. E. 283.

(1302)

stream, and the residue was of much less value than it would have been had it been so situated, the conveyance was rescinded, and the purchase-money decreed to be refunded, upon the ground that there was an innocent mistake as to the situation of the land, and the substantial inducement to the contract.¹

This same principle governs where there is an innocent mistake as to the *quantity*. Of course the parties *may* contemplate a contract of *hazard*, taking the land according to its known metes and bounds, or even subject to a contingency as to its metes and bounds, at a price in gross; but such an agreement must be *clearly shown*, and that not merely by the use of the phrase "more or less," but by a clear indication of such an intent. Except where such a contract of hazard is proved, wherever the real quantity turns out to be materially more or less than what was anticipated by the parties, whether the sale be *by the acre*, or otherwise, equity entertains jurisdiction and gives relief, on the ground of mistake.²

If the *design* of either party in the transaction (although it is more likely to occur with the purchaser) be *frustrated* in consequence of the mistake in the quantity, the contract or conveyance is to be *rescinded*, and the purchase-money, if any has been paid, is to be refunded; but if the plans of the parties may be carried into effect, notwithstanding the difference in quantity, *compensation* is to be decreed on the one side or the other, according as the quantity ascertained is less or more than the quantity expected.³

Where the contract is not one of *hazard*, so that the court of

1. 2 Min. Insts. 702; 2 Lom. Dig. 412, 413; Chamberlaine v. Marsh, 6 Munf. (Va.) 282; Glassell v. Thomas, 3 Leigh (Va.) 137. See post, §§ 1306, 1307.

2. 2 Min. Insts. 702; Triplett v. Allen, 26 Gratt. (Va.) 723, 724, 21 Am. Rep. 320. See post, § 1307.

3. 2 Min. Insts. 702; 2 Lom. Dig. 414, et seq.; Quesnel v. Woodlief, 6 Call (Va.) 218; Bierne v. Erskine, 5 Leigh (Va.) 62, 64; Hull v. Cunningham, 1 Munf. (Va.) 330; Blessing v. Beatty, 1 Rob. (Va.) 287; Crawford v. McDaniel, 1 Rob. 448; Neal v. Logan, 1 Gratt. (Va.) 14; Purcell v. McCleary, 10 Gratt. 246; Hoback v. Kilgore, 26 Gratt. 444, 21 Am. Rep. 317.

equity will relieve against a *deficiency* in the quantity, the *general rule* of compensation is according to the *average value* of the whole tract, except where peculiar circumstances require a departure therefrom. Thus, if the structures upon the land were only the *ordinary* farm-building and improvements, the general rule would prevail, but if the structures and appendages constituted the *chief value* of the premises, they must be taken into account, and deducted from the total value of the premises, before proceeding to ascertain the average value per acre.⁴

And if, by the expenditure of a certain amount of money and trouble, the vendee obtains a satisfactory title to the lacking quantity, the compensation decreed is to be, not the *pro rata* value thereof, but the amount expended in procuring the title, with a reasonable remuneration for his trouble.⁵

Where the vendee has got the tract of land he bargained for, although not by the boundaries designated, which have been innocently mis-stated by a mistake common to both parties, the conveyance will be *reformed* in equity according to the truth; but as no mistake has occurred in the substantial inducement to the contract, no relief can be given as for a diminished or an increased quantity.⁶

§ 1188. Same—Compromise of Doubtful Rights.

In the case of a *compromise of doubtful rights*, ignorance

4. 2 Min. Insts. 703; *Blessing v. Beatty*, 1 Rob. (Va.) 298; *Hoback v. Kilgore*, 26 Gratt. (Va.) 444, 21 Am. Rep. 317; *Watson v. Hoy*, 28 Gratt. 698; *Yost v. Mallicote*, 77 Va. 615.

5. 2 Min. Insts. 703; *Hull v. Cunningham*, 1 Munf. (Va.) 330.

6. 2 Min. Insts. 703; 2 Lom. Dig. 416; *Keyton v. Brawford*, 5 Leigh (Va.) 39; *Stafford v. White*, 6 Gratt. (Va.) 93. It may be remarked that when it is obvious on the *face of a writing* that a word or phrase has been omitted by mistake or inadvertence, and the words which the parties must have intended to use to express their meaning, be obviously and naturally suggested upon the mere inspection of the writing, such words, or words of like import may be supplied. 2 Lom. Dig. 255-'6; 2 Min. Insts. 703; 2 Pars. Cont. 73, 75; *Benj. Sales*, § 53; *Smith v. Lloyd*, 16 Gratt. 311; *Peyton v. Harman*, 22 Gratt. 645-'6.

(1304)

of fact is in general no ground for annulling the adjustment made (supposing that there is no fraud nor misrepresentation), however unequal it may prove to be, and although concessions may be made which neither law nor fact required. The peace of society is thus best secured, for no compromise could ever be made if compromises might be overthrown upon any subsequent ascertainment of right contrary thereto.¹

§ 1189. Effect upon a Deed, Validly Executed, of Matter Arising Ex Post Facto—Discussion Outlined.

Supposing a deed to have been in every respect validly executed, there are certain circumstances which, occurring after its execution, may avoid it, or at least impair its effect. Those may be enumerated as follows: (1) Erasure, interlining, or other alteration; (2) Breaking off or defacing the seal; (3) Delivering it up to be cancelled; (4) Disclaimer of title by the grantee; (5) Disagreement of persons whose concurrence is necessary in order for the deed to stand.¹

§ 1190. I. Effect of Erasure, Interlineation or Other Alteration—1. In Case of Contract Executed.

An important distinction as to the effect of an erasure, interlineation, or alteration in a deed, is between conveyances or *contracts executed* on the one side, and *contracts executory* on the other.

No *erasure* nor *alteration* in a *conveyance*, nor even the *cancellation* thereof by mutual consent of the parties, can divest an estate already vested by the operation of the deed; for that would be in conflict with the statute of Conveyances, which declares that "no estate of inheritance or freehold, or for a term of more than five years in lands, shall be conveyed unless *by deed or will*."¹ But the estate being vested according to the

1. 2 Min. Insts. 701; 2 Lom. Dig. 412; 1 Story, Eq. Jur., § 129, et seq.; Jones v. Carter, 4 Hen. & M. (Va.) 184; Moore v. Fitzwater, 2 Rand. (Va.) 442; Zane v. Zane, 6 Munf. (Va.) 406.

1. 2 Min. Insts. 737; 2 Bl. Com. 308, 309.

1. Va. Code, 1904, § 2413; 2 Min. Insts. 738.

original tenor of the deed, if the rasure or alteration makes it impossible to see what that was, and there is no extrinsic evidence to show it, such rasure or alteration may in that way be fatal to the title evidenced by the conveyance.²

The fact, however, that the deed contains *immaterial* interlineations or alterations will not affect its value as evidence of title in an action for the land.³

**§ 1191. Same—2. In Case of Contracts Executory—
A. Alteration by a Stranger.**

In respect to the erasure or alteration of contracts executory, the most material consideration is, whether it were made by a *stranger*, in which case it is styled a *spoliation*, or by a *party* to the instrument, or one interested therein, when it is known as an *alteration*.¹

The alteration made by a *stranger* to the instrument, that is, a spoliation, in no wise affects the *validity* of the instrument, provided only the *original tenor* of it can be made to appear. The remedy upon the instrument thus changed may be either in a court of law or in equity, the latter forum obtaining cognizance, because formerly the courts of law declined to allow the contents of a *deed* to be proved otherwise than by the deed itself; and because also, it was often necessary to demand a *discovery* upon oath of the original tenor of the writing, and independently of statute, a court of law has no power to coerce a discovery.²

2. 2 Min. Insts. 738; 2 Lom. Dig. 379, 380; 2 Bl. Com. 309, n. (22); *Grayson v. Richards*, 10 Leigh (Va.) 57; *McMurray v. Dixon*, 105 Va. 605, 54 S. E. 481; *Southern R. Co. v. Gregg*, 101 Va. 308, 43 S. E. 570.

3. *Virginia & Tenn. Coal & I. Co. v. Fields*, 94 Va. 102, 26 S. E. 426.

1. 2 Min. Insts. 738; 1 Greenleaf, Ev., § 565, et seq.; 2 Lom. Dig. 380.

2. 2 Min. Insts. 738; 1 Greenleaf, Ev., § 565, et seq.; 2 Lom. Dig. 380. See Va. Code, 1904, § 3370.

§ 1192. Same—B. Alteration by Party to Contract or One Interested.

If the change be *immaterial*, or of such matter as the law itself would supply, and be made *innocently*, it does not affect the validity of the writing, which, however, is binding only according to its original terms and effect; and if they cannot be proved, the instrument can of course avail nothing. But where the change relates to a matter *material*, or although it be immaterial, where it appears to have been made with an ill intent, the writing is avoided so far as it relates to what is executory. So far as it actually *vests an estate*, no subsequent alteration, by whomsoever made, or with what intent soever, can divest it, although, as already explained, it may defeat the estate by reason of the failure of proof.¹ Thus, where an alteration of the date of a *bond* in suit was made from 1878 to 1879, apparently without guilty intent on the part of either party, and not having the effect of barring action on the bond through the operation of the statute of limitations, it was held to be an *immaterial* alteration, *innocently* made, and therefore to be overlooked.²

It should be observed that this doctrine is by no means confined to *sealed* instruments, but applies as well to all writings (including *contracts to convey* land). No party to any writing is to be allowed to tamper with it by any alteration, either material, or made with a bad intent, without subjecting himself to the just penalty of thereby avoiding the instrument altogether, so far as its future effect is concerned. And it must be remembered, that it is a well established principle, that every endorsement or memorandum attached to the writing, with the knowledge of the parties, at the time of its execution, is as much a part of it as if it had been contained in the body of the instrument.³

1. 2 Min. Insts. 738, 739; 1 Greenleaf, Ev., § 565, et seq.; 2 Lom. Dig. 380; *Bashaw v. Wallace*, 101 Va. 733, 45 S. E. 290. As to what is a material, and what an immaterial, alteration, see *Woodworth v. Bank of America*, 19 Johns. (N. Y.) 391, 10 Am. Dec. 267, et seq.; note.

2. *Bashaw v. Wallace*, 101 Va. 733, 45 S. E. 290.

3. 2 Min. Insts. 739; *Shermer v. Beale*, 1 Wash. (Va.) 11; *Gordon* (1307)

It is an important question, where an erasure, interlineation, or alteration appears, whether it was made *prior* or *subsequent* to the execution of the writing. It seems to be the better opinion (in pursuance of the maxim, *omnia rite acta præsumuntur*), that the *presumption* is, that it was made *before the execution*, if nothing appear to the contrary, such as a difference in the color of the ink, or in the hand-writing, and the like. When any such circumstance of suspicion occurs, it must, in general, be explained, in order to make the writing available.⁴

The principle of rasure, etc., applies to the *filling of blanks*. Thus, a blank filled after the paper is signed, without the consent of the party concerned therein, or his *duly authorized* agent, avoids the instrument. When the instrument is *under seal*, an agent to fill a blank must be *empowered* under seal, or by the personal presence and assent of the party to be affected.⁵

It is worth while to observe, that a deed or writing may be considered as an entire transaction, operating as to the different parties from the time of execution by each, but not perfect till the execution by all. Any alteration made in the progress of such a transaction still leaves the instrument valid as to the parties previously executing it, provided the alteration does not affect their situation. Thus if, when A executes the writing, there are blanks, which are filled up before B executes it, but the filling up does not affect A, the obligation and effect of the writing as to A is not thereby impaired.⁶

v. Frazier, 2 Wash. 130; *Newell v. Mayberry*, 3 Leigh (Va.) 250, 23 Am. Dec. 261; *Harnsberger v. Gieger*, 3 Gratt. (Va.) 144; *Smith v. Spiller*, 10 Gratt. 318.

4. 2 Min. Insts. 739; 2 Lom. Dig. 380; 1 Greenleaf, Ev., § 564; 2 Th. Co. Lit. 232, n. (13); 3 Th. Co. Lit. 371, n. (11); 2 Parsons, Cont. 228, n. (a); *Beaman v. Russell*, 20 Vt. 205, 49 Am. Dec. 775, et seq., 782, note; *Slater v. Moore*, 86 Va. 26, 9 S. E. 419; *Elgin v. Hall*, 82 Va. 683.

5. 2 Min. Insts. 739; 2 Lom. Dig. 380; *Hudson v. Revett*, 5 Bing. 368; *Cleaton v. Chambliss*, 6 Rand. (Va.) 86; *Rhea v. Gibson*, 10 Gratt. (Va.) 215; *Preston v. Hull*, 23 Gratt. 616, 14 Am. Rep. 153.

6. 2 Min. Insts. 740; 2 Bl. Com. 308, n. (20); *Doe v. Bingham*, 4 B. & Ald. 675.

(1308)

And upon like principles, where after a bond has been executed by principal and sureties, a memorandum is made and signed by the principal, without the knowledge of the sureties, stipulating that the bond shall bear interest from its date, instead of from nine months after date, as was expressed upon its face, the bond is not thereby invalidated.⁷

It is usual and prudent, in order to obviate all suspicion and uncertainty, when any rasure, interlineation, or alteration is made in a deed, or other writing, to *note it* as having been made before execution, at the foot of the deed, so as to be authenticated by the signature, or in the clause of attestation.⁸

§ 1193. II. Effect of Breaking Off or Defacing the Seal.

It was originally held, that if the seal of a deed was broken off, or so defaced that no sign of it could be seen (unless the party bound by the instrument did it), the deed was avoided; so that the avulsion of the seal was a species of rasure or alteration, and was governed in general by the same principles. The modern doctrine, however, is that if it appear that the seal has been affixed, and was afterwards broken off or defaced by accident, or by a stranger, the validity of the deed is not thereby affected. And an *estate once vested is not divested* by the destruction of the seal on the conveyance, whosoever did it, or with whatsoever intent; but as a seal is requisite to make the instrument *a deed*, it will be needful to show that there was once a lawful seal.¹

7. 2 Min. Insts. 740; Tremper v. Hemphill, 8 Leigh (Va.) 623, 31 Am. Dec. 673.

8. 2 Min. Insts. 740.

1. 2 Min. Insts. 740; 2 Bl. Com. 308, n. (21); Bolton v. Bishop of Carlisle, 2 H. Bl. 263. But the doctrine of the *avulsion* of the seal in *executory* contracts was relaxed at an earlier period than in the case of rasures, etc., it having been long admitted that the validity of the instrument is not affected if it appears, or there is reason to presume, that the seal was torn off by accident, or by a stranger, or was destroyed by time. 2 Min. Insts. 741; 2 Bl. Com. 308, n. (21); Shepp. Touchst. 70; 2 Lom. Dig. 381; Keen v. Monroe, 75 Va. 427-'8.

§ 1194. III. Effect of Cancelling the Deed.

In this case also, the distinction between *executed* contracts (or conveyances) and *executory* contracts, is all-important. In the case of a *conveyance*, where the estate is once vested, the cancellation of the deed cannot divest it, because, as already explained, the statute of Conveyances declares that no estate in lands exceeding a term of five years, shall be conveyed unless *by deed or will*.¹

But in the case of an *executory contract*, where the parties mutually agree that it shall be delivered up to be cancelled; that is, to have lines drawn over it in the form of lattice-work, or *cancelli* (though the phrase has long been used figuratively for any manner of obliteration or defacement); and it is cancelled accordingly or destroyed, the contract is avoided.²

§ 1195. IV. Disclaimer of Title by Grantee.

Where the conveyance is by *deed indented*, as the grantee by executing the deed accepts the estate, he cannot afterwards *disclaim*, although of course he may *reconvey* it. But in case of a *deed-poll*, it is said that, although the estate conveyed passes to the grantee independently of his assent, so that, if he does not choose to accept it, he must formally *disclaim the title*, yet he is not estopped so to do.¹

The distinction, above adverted to, between disclaiming the title, whereby the effect of the conveyance is avoided, and reconveying the estate, which recognizes the previous conveyance as good and effectual, is sometimes of great practical importance; as for example, where a *condition* or *covenant* is annexed to the grant. In that case, as we have seen, by accepting the estate,

1. 2 Min. Insts. 741; Va. Code, 1904, § 2413; 2 Bl. Com. 309, n. (22); *Doe v. Bingham*, 4 B. & Ald. 672; *Roe v. Archbishop of York*, 6 East. 86; *Bolton v. Bishop of Carlisle*, 2 H. Bl. 263; *Grayson v. Richards*, 10 Leigh (Va.) 57. See *McMurray v. Dixon*, 105 Va. 605, 54 S. E. 481; *Southern R. Co. v. Gregg*, 101 Va. 308, 43 S. E. 570.

2. 2 Min. Insts. 741; 2 Lom. Dig. 381; 2 Bl. Com. 308; *Sheppard's Touchst.* 70.

1. 2 Min. Insts. 741; 2 Lom. Dig. 377.
(1310)

the grantee becomes *personally obliged* to perform the condition or covenant notwithstanding the burden may exceed the benefit,² so that in case of a *reconveyance*, the obligation, if third persons were concerned in it would still remain, whilst in case of a *disclaimer*, the effect of the original deed being annulled, the grantee would be exonerated³ from all responsibility.³

It was once thought that the disclaimer of a *freehold* estate must be made *by matter of record*, where it can be made at all;⁴ but it has long since been settled that it may also be done *by deed*, as by the effect of the Virginia statute of Conveyances⁵ would seem also to be required in case of a *leasehold exceeding five years*.⁶

§ 1196. V. Effect of Disagreement of Persons Whose Concurrence Is Necessary.

Thus, at common law, if a husband, where a *feme covert* is concerned, or the wife herself after the coverture is ended, disagrees to the conveyance, it is thereby avoided.¹ In Virginia, however, under the statute converting all the wife's property into her separate estate, this is no longer the law, but the *wife* only has such right to disagree to the conveyance as if she were *unmarried*, and the *husband* has no right at all to disagree to it on her behalf.²

2. Ante, §§ 423, 544; 2 Min. Insts. 741; Vanmeter v. Vanmeter, 3 Gratt. (Va.) 148; Crawford v. Patterson, 11 Gratt. 364; Hill v. Huston, 15 Gratt. 350; Taliaferro v. Day, 82 Va. 79, 95.

3. 2 Min. Insts. 741, 742; 2 Lom. Dig. 376, 377.

4. 4 Co. 26a.

5. Va. Code, 1904, § 2413.

6. 2 Min. Insts. 742; 2 Lom. Dig. 377; McMurray v. Dixon, 105 Va. 605, 54 S. E. 481; Southern R. Co. v. Gregg, 101 Va. 317, 43 S. E. 570; Haney v. Breeden, 100 Va. 781, 42 S. E. 916; Fry v. Stowers, 98 Va. 417, 36 S. E. 482; Jennings v. Graveley, 92 Va. 377, 23 S. E. 763; Suttle v. Richmond, F. & P. R. Co., 76 Va. 284; Skipwith v. Cunningham, 8 Leigh (Va.) 285, 31 Am. Dec. 642.

1. 2 Min. Insts. 742; 2 Lom. Dig. 377; 2 Bl. Com. 309.

2. Va. Code, 1904, § 2286a.

(1311)

2 Min. Real Prop—18

So, if an infant, a lunatic or a person under duress, when these disabilities are removed, disagree to a conveyance, it is thereby avoided.³

3. Ante, § 1087; 2 Min. Insts. 656, 742; 2 Lom. Dig. 377, 378; 2 BL Com. 309.
(1312)

CHAPTER XLIII.

TITLE BY CONVEYANCE CONTINUED—III. THE SEVERAL SPECIES OF CONVEYANCE.

- § 1197. Outline of Discussion.
- 1198. Original or Primary Conveyances at Common Law.
 - I. Feoffment.
- 1199. II. Gift.
- 1200. III. Lease.
- 1201. IV. Grant.
- 1202. V. Exchange.
- 1203. VI. Partition.
- 1204. Derivative or Secondary Common Law Conveyances—Enumeration.
- 1205. I. Release.
- 1206. Several Ways in Which a Release May Enure or Operate—Enumeration.
 - 1207. 1. Release Enuring by Way of Passing a Right.
 - 1208. 2. Release Enuring by Way of Passing an Estate.
 - 1209. 3. Release Enuring by Way of Enlarging an Estate.
 - 1210. 4. Release Enuring by Way of Extinguishment.
 - 1211. 5. Quitclaim Deeds.
- 1212. II. Surrender.
 - 1213. Possession of Surrenderor.
 - 1214. Estate of Surrenderee.
 - 1215. Priority of Estate between Surrenderor and Surrenderee.
 - 1216. Doctrine as to Livery of Seisin.
 - 1217. The Written Evidence of Surrender.
 - 1218. Doctrine of Surrender in Law.
 - 1219. Effect of Surrender.
- 1220. III. Confirmation.
 - 1221. Confirmation Operating to Make Sure a Voidable Estate.
 - 1222. Confirmation Operating to Enlarge a Particular Estate.
 - 1223. Requisites of a Confirmation.
- 1224. IV. Assignment.
 - 1225. Mode of Assignment.
 - 1226. What May Be Assigned.

(1313)

- 1227. Rights and Liabilities Arising Out of the Assignment of a Lease.
- 1228. V. Defeasance.
- 1229. Conveyances Operating under Statutes—The Statutes Referred to.
- 1230. Conveyances Operating under the Statute of Uses.
 - I. Conveyances Operating with Actual Transmutation of the Possession.
 - 1231. II. Conveyances Operating under the Statute of Uses without Actual Transmutation of the Possession.
 - 1232. 1. Conveyances Operating as a Bargain and Sale.
 - 1233. 2. Conveyance Operating as a Covenant to Stand Seised.
 - 1234. 3. Conveyance by Lease and Release.
 - 1235. Conveyances Operating under the Statutes of Grants and of Future Grants.
 - 1236. Curative Effect of Conveyances Operating under Statutes of Uses and Grants.
 - 1237. Illustrations of Operation of Statutory Conveyances.

§ 1197. Outline of Discussion.

Having in the preceding chapter explained the general nature of deeds, and more particularly of deeds of conveyance of landed property, we are now to consider the several species of conveyances of lands, together with their respective incidents; of all of which species of conveyances the *deed* is the common instrument—by usage at common law and by positive requirement under the English statute of Frauds and the Virginia statute of Conveyances.¹

The main division of conveyances is into (1) Conveyances operating *at common law*; and (2) Conveyances operating *under statutes*. Common law conveyances are in turn divided into *original* or primary conveyances, by means whereof the benefit or estate is created or first arises, not necessarily supposing any other previous transaction touching the property transferred, and *derivative* or secondary conveyances, whereby a benefit or estate *previously created* is enlarged, restrained, transferred or extinguished.²

1. 2 Min. Insts. 743; 29 Car. II, c. 3; Va. Code, 1904, § 2413.

2. 2 Min. Insts. 744; 2 Bl. Com. 309.

The original or primary common law conveyances are (1) Feoffment; (2) Gift; (3) Lease; (4) Grant; (5) Exchange; and (6) Partition.³

The derivative or secondary common law conveyances are (1) Release; (2) Surrender; (3) Confirmation; (4) Assignment; and (5) Defeasance.⁴

The *statutory conveyances*, or conveyances operating under statutes are (1) Those taking effect by way of use under the *statutes of Uses*,⁵ which embrace conveyances operating *with* actual transmutation of the possession, such as a feoffment, fine or recovery to A to the use of B, and also those operating *without* transmutation of the possession, including (a) Conveyances by way of bargain and sale; (b) Conveyances by way of covenant to stand seised; and (c) Conveyances by way of lease and release; and (2) Conveyances operating under the *statutes of Grants* and *Future Grants*.⁶

In tabulated form, these various forms of conveyance, which will be discussed *seriatim* in the following sections, appear as follows:

I. Common Law Conveyances.

A. Original or Primary Conveyances.

1. Feoffment.
2. Gift.
3. Lease.
4. Grant.
5. Exchange.
6. Partition.

B. Derivative or Secondary Conveyances.

1. Release.

3. 2 Min. Insts. 744; 2 Bl. Com. 310. The conveyances by fine and common recovery are conveyances by *matter of record*, being in effect judgments of a court and not theoretically conveyances at all, and are therefore not included in this classification. See 2 Min. Insts. 991, et seq.

4. 2 Min. Insts. 783.

5. 2 Min. Insts. 744; 27 Hen. VIII, c. 10; Va. Code, 1904, § 2426.

6. 2 Min. Insts. 744; Va. Code, 1904, §§ 2417, 2418.

(1315)

2. Surrender.
3. Confirmation.
4. Assignment.
5. Defeasance.

II. Statutory Conveyances.

A. Conveyances Operating under the Statute of Uses.

1. Conveyances Operating with actual Transmutation of Possession.
2. Conveyances Operating without actual Transmutation of Possession.
 - a. Conveyances by Bargain and Sale.
 - b. Conveyances by Covenant to Stand Seised.
 - c. Conveyances by Lease and Release.

B. Conveyances Operating under the Statute of Grants.

C. Conveyances Operating under the Statute of Future Grants.

§ 1198. Original or Primary Conveyances at Common Law—I. Feoffment.

A feoffment is derived from the verb to enfeoff, *feoffare*, or *infendare*, to give one a feud; and therefore feoffment is properly *donatio feudi*. It is the most ancient method of conveyance, the most solemn and public, and therefore the most easily remembered by the public, and proved. It is applied to *corporeal property* alone, and as Lord Coke says "properly betokeneth a conveyance *in fee*," although it is sometimes improperly used with reference to estates of freehold merely, as for life. He that so gives, or enfeoffs, is called the *feoffor*, and the person enfeoffed is denominated the *feoffee*.¹

The common law required *no deed nor writing* in order to constitute an effectual feoffment. Such a requirement would have been ill-suited to so illiterate a population as composed the Saxon and Norman communities; nor was it made until so recently as the statute of Frauds, etc., 29 Car. II., c. 3, §§ 1, 2, 3,

1. 2 Min. Insts. 744; 2 Th. Co. Lit. 332, 353; 1 Th. Co. Lit. 622; 2 Bl. Com. 309.

(1316)

(A. D. 1678), in England, to which the statute of Conveyances with us corresponds.²

But *mere words*, whether contained in a deed or expressed orally, do not suffice, at common law, to perfect the feoffment. There remains to be performed the indispensable ceremony of livery of seisin, without which the feoffee has but a mere *estate at will*. The word seisin imports the possession of a *freehold*, and the phrase livery of seisin signifies the actual *delivery* by the feoffor to the feoffee of the corporeal possession of the *freehold* of lands or tenements, which was held absolutely necessary to complete the donation; so that livery of seisin is no other than the pure feudal investiture or delivery to the grantee of the corporeal possession of the lands.³

Although the feoffor may have no lawful estate in the premises, or a less one than the feoffment accompanying the livery specifies and purports to pass, yet such solemnity and importance is attached by the common law to the ceremony of livery, that supposing the grantor to be *in possession*, the full compass of the estate designated passes, liable to be divested *by action only*, and not by entry. Hence, wrongful conveyances thus sanctioned by livery are known as *tortious conveyances*, because they are liable to be in this manner perverted so as to work a *tort* or wrong to the true owner.⁴

In Virginia it is provided by statute, in substance, that a conveyance shall pass or assure no greater right or interest in real estate than the person making it may lawfully pass or assure.⁵

§ 1199. II. Gift.

The conveyance by *gift* (*donatio*) is properly applied to the creation of an *estate tail*, as feoffment is to that of a fee simple,

2. 2 Min. Insts. 745; Va. Code, 1904, § 2413. For form of deed of feoffment, see ante, § 1108, notes.

3. 2 Min. Insts. 745, 746; 2 Bl. Com. 311. As to the origin, nature and several kinds of livery, see ante, § 143, et seq.; 2 Min. Insts. 746, et seq.

4. Ante, § 210; 2 Min. Insts. 749; 2 Th. Co. Lit. 353, 354, n. (B, 1).

5. Va. Code, 1904, § 2419; ante, § 210; 2 Min. Insts. 598, 111, 749.

and lease to that of an estate for life or for years. It differs in nothing from a feoffment but in the nature of the estate passing by it; for the operative words are the same, namely, *do* or *dedi*; and gifts in tail, like all estates of *freehold*, are equally imperfect without *livery of seisin* as are feoffments in fee simple. And this is the only distinction which Littleton seems to take when he says.¹ "It is to be understood that there is feoffer and feoffee, donor and donee, lessor and lessee," namely, as he explains, that feoffer is applied to a feoffment in fee simple, donor to a gift in tail, and lessor to a lease for life or for years, or at will. In common acceptation, gifts are not unfrequently confounded with grants, presently to be mentioned.²

In Virginia, with the abolition of estates tail,³ there is no longer such a conveyance of land as a "gift," using the term in its technical sense.

§ 1200. III. Lease.

A lease is a conveyance of lands or tenements (usually in consideration of a rent or other annual or periodical recompense) for life, for years or at will, but always *for a less time* than the lessor hath in the premises; for if it be for the grantor's *whole interest*, supposing the grantor to have an estate for life or years, it is more properly an *assignment* (one of the secondary conveyances) than a *lease*.¹

Hence, where one, being in possession of land to which he has no title, but which he is authorized by the owner to rent out for his own benefit, makes a written contract to let the land to another for a year, for one-half of the crops raised on it, the transaction is not a lease, the supposed lessor having no reversion; but constitutes the parties joint tenants of the crop raised.²

The subject of leases has been quite fully discussed hereto-

1. 1 Th. Co. Lit. 622.

2. 2 Min. Insts. 749, 750; 2 Bl. Com. 316, 317.

3. Va. Code, 1904, § 2421; ante, § 194.

1. 2 Min. Insts. 750, 751; 2 Bl. Com. 317; 2 Th. Co. Lit. 403, n. (A).

2. 2 Min. Insts. 751; *Lowe v. Miller*, 3 Gratt. (Va.) 205, 212, 46 Am. Dec. 188.

fore in treating of estates for years and the relation of landlord and tenant, and to these discussions the student is now referred.³ Suffice it here to recall that under the Virginia statute of Conveyances, if a lease be of a freehold or of a term exceeding five years, it must be *by deed*;⁴ and that under the Virginia statute of Parol Agreements, no action shall lie upon a *contract* for the sale of land or for the lease thereof for *more than one year*, unless the contract or a memorandum or note thereof be *in writing*, signed by the party to be charged thereby or his agent.⁵

§ 1201. IV. Grant.

A grant is the regular method, by the common law, of transferring the property of *incorporeal* hereditaments, or of things whereof, from their nature, livery cannot be had. For which reason, as all *corporeal* hereditaments, such as lands and houses, are at common law said to *lie in livery*, so the others, as commons, rents, ways, franchises, remainders, reversions, etc., are said to *lie in grant*. The operative technical words of a grant, are *dedi et concessi*, hath given and granted; but any other words that show the intention of the parties will have the same effect, such as *aliene*, *limit* and *appoint*, *bargain* and *sell*, etc. Even where A granted and agreed that, in consideration of a certain rent, B should have a way over his lands, it was held to be a *grant of a right of way*, and not a mere covenant for enjoyment.¹

A feoffment, might at common law be made *by parol only*, the operative ceremony designed to give certainty and notoriety to the transaction being livery of seisin; but a grant required *a deed* always, even at common law; a deed (as *livery* is impossible), affording the only sufficient evidence of what was done.²

3. Ante, §§ 357, et seq., 399, et seq. See 2 Min. Insts. 751, et seq.

4. Va. Code, 1904, § 2413.

5. Va. Code, 1904, § 2840.

1. 2 Min. Insts. 777, 778; 2 Bl. Com. 317; *Holmes v. Sellers*, 3 Lev. 305.

2. 2 Min. Insts. 778; 2 Lom. Dig. 117; 2 Th. Co. Lit. 356. But a grant, that is, a deed, is just as necessary for the transfer of an estate *for years* in an incorporeal hereditament as it is for a *freehold*.

Grants need *no consideration* of value or of blood to give them effect as between the parties; and, when made applicable to the transfer of *land* (as they have been by statute),³ they may for that reason be effectual in creating ulterior limitations to persons *not in being* or *not ascertained*, which might fail if they were created by bargain and sale or covenant to stand seised, as being outside of the considerations which ought to support them.⁴

At common law, as we have seen, no freehold estate in *corporeal* property can be created to commence *in futuro* for two reasons: (1) That the freehold can pass only by livery of seisin, which is incompatible with any but an immediate estate *in presenti*; (2) That if it were allowed, there would be no one to perform meanwhile the feudal services, or if need were, to sue or be sued for the subject. That this last reason of policy was the more operative, is demonstrated by the fact, that a grant of a freehold estates *in rents*, or other incorporeal hereditaments, already *in esse*, or created, to commence *in futuro*, is void at common law, although of course no livery is required, or is possible, whilst an *original grant* of a freehold estate in a rent, etc., created *de novo* may be made to begin *in futuro*, for no stranger can have occasion to sue, nor any one to be sued, for any rent, etc., thus newly created.⁵

But in Virginia all distinctions of this kind are obviated by the *statute of Future Grants*, providing that any estate may be made to commence *in futuro* by *deed* in like manner as by *will* and that any estate which would be good as an executory devise or bequest shall be good if created by *deed*.⁶

The *operation* of a grant at common law is materially different from that of a feoffment; for, as we have seen, a feoffment by force of the livery operates immediately upon the *possession*, without regard to the actual estate or interest of the feoffor; but a grant only operates on the *estate* of the grantor,

3. Va. Code, 1904, §§ 2417, 2418; post, § 1235.

4. 2 Min. Insts. 778; 2 Lom. Dig. 116.

5. 2 Min. Insts. 778, 779; 2 Lom. Dig. 118.

6. Va. Code, 1904, § 2418; 2 Min. Insts. 779.

and will pass no more than the grantor is by law enabled to convey. Hence, a grant though tortious can never operate to produce a *forfeiture* as a feoffment does. This rule is conjectured to have arisen from the circumstance that a grant being always *by deed*, the grantee's estate might be known by inspection of the deed, and so it was not needful, in order to protect the interests of purchasers, to regard more as passing than the grantor possessed and could really give. However, another reason, at least as satisfactory, is suggested by C. B. Gilbert namely, that a grant is a *secret* conveyance, and ought not to be allowed the same extensive operation as a feoffment, with its notorious *livery of seisin*.⁷

But in Virginia, under the statutes of Grants and of Future Grants, lands, as well as incorporeal property, lie in grant and may *pass by deed alone*, such conveyances having all the incidents of conveyances by *grant at common law*, as will more fully appear when we come to the examination of conveyances *under statutes*.⁸

§ 1202. V. Exchange.

This term does not signify *mere reciprocal conveyances*. An *exchange* is a *single* conveyance, containing a *mutual grant of equal interests* in lands, the one in consideration of the other. The word "*exchange*" is so individually requisite and appropriated by law to this case, that the conveyance without it cannot operate *as an exchange*. It can be supplied by no other word, nor expressed by any circumlocution. The estates exchanged must be *equal in quantity*; not of *value*, for that is immaterial, but of *interest*; as fee simple for fee simple, life-estate for life estate, and lease for years for lease for years, and the like; and in this aspect an estate in joint tenancy is esteemed equal to, and is, therefore, exchangeable with a tenancy in common. The exchange may be of things that lie either in grant

7. 2 Min. Insts. 779; Gilbert, Ten. 122; 2 Th. Co. Lit. 402, n. (Q, 1); 2 Lom. Dig. 118.

8. Va. Code, 1904, §§ 2417, 2418. See post, § 1235.

or in livery, and they may be exchanged, the one kind for the other. But even in the exchange of freeholds in corporeal property, no livery of seisin is necessary to perfect the conveyance. Entry, however, must be made on both sides; for if either party die before entry, the exchange is void for want of sufficient notoriety; except that if one has entered, *he* shall not first begin to avoid the transaction. There is incident to an exchange, tacitly implied in the word, a *condition* and a *warranty*. By virtue of the *condition*, if either party be evicted from *any part* of the land he receives, by defect of the other's title, he may re-enter upon his own land, and avoid the exchange *in toto*. And by virtue of the *warranty* (which is an ancient warranty, and not a modern covenant of title), upon a like eviction, he may vouch and recover over of the other party so much of *his own land* (the warranty applies to no other), as is equal *in value* to what he has lost.¹

Lord Coke enumerates five elements as necessary at common law to the perfection of an *exchange*, namely,²

1. That the estates given be *equal*;
2. That the word *escambium*, exchange, be used;
3. That there be an execution by *entry or claim* in the life of the parties;
4. That if it be of things that *lie in grant*, it must be *by deed* indented;
5. That if the lands be in several counties, there ought to be a *deed indented*; or if the things lie *in grant*, albeit they be in one county.

The first and second of these requisites subsist in Virginia comparatively unchanged; but the other three, and indeed the first two also, are much modified in their practical effect by the statute of Conveyances, declaring that no estate of inheritance, nor of freehold, nor for more than five years in real estate, shall be conveyed unless by deed or will; whereby a *deed* is made req-

1. 2 Min. Insts. 781; 2 Bl. Com. 323; 2 Th. Co. Lit. 448, n. (G). See *Lagorio v. Dozier*, 91 Va. 502, 503, et seq., 22 S. E. 239.

2. 2 Th. Co. Lit. 446; 2 Min. Insts. 781.
(1322)

uisite wherever the estate exceeds five years, whether of lands, or things incorporeal; and by the statute of Grants, declaring that all real estate shall, as to the immediate freehold, be deemed to *lie in grant*, as well as *in livery* whereby the conveyance is made in all cases operative, if not as an *exchange*, yet as a *grant*.³

It is to be observed that there can be but *two distinct parties* to an exchange as intimated by Littleton;⁴ but there may be *any number of persons*, so they constitute only two parties in interest. Thus, as we have seen, two or more joint tenants may exchange with two or more tenants in common,⁵ or a wife may unite with her husband on one side to exchange lands with another person or persons on the other.⁶ And if the deed of exchange omits the name of the grantee of one of the parcels of land, the court may supply the omission and give effect to the deed if, on inspection of the deed, enough shall appear to show in whom the title to that parcel vested.⁷

§ 1203. VI. Partition.

At common law, as between *joint* tenants and tenants *in common*, a partition is a *conveyance*; and in the case of joint tenants, must, at common law, be evidenced by a *deed*, livery of seisin being as to them mutually impracticable; in the case of tenants in common, it must be evidenced by livery of seisin, in case of *freehold*. If the estate be less than freehold, it is believed that tenants in common may make partition by *parol*.¹

But by the English statute of Frauds, 29 Car. II, c. 3, §§ 1, 2, 3, if the estate to be partitioned is for *more than three years*, it must be by *deed or writing*; and in Virginia it is regulated by the statute of Conveyances, which requires that if the estate be one of inheritance, or a freehold, or a term exceeding *five years*, it must be by *deed*.²

3. Va. Code, 1904, §§ 2413, 2417; 2 Min. Insts. 782.

4. 2 Th. Co. Lit. 446; 2 Min. Insts. 782.

5. 2 Min. Insts. 782; 2 Th. Co. Lit. 447, n. (8); 2 Lom. Dig. 133.

6. Lagorio v. Dozier, 91 Va. 502, 503, 22 S. E. 239.

7. Lagorio v. Dozier, 91 Va. 503, 504, 22 S. E. 239.

1. 2 Min. Insts. 782; 2 Bl. Com. 324; 2 Lom. Dig. 134.

2. Va. Code, 1904, § 2413; 2 Min. Insts. 783.

As between *coparceners*, however, a partition is not at common law deemed a *conveyance* at all, for it is said it makes *no degree* in deducing title since the partition between coparceners was at common law *compulsory*, and therefore might be made *by parol* and without livery on either side. And such was the state of the law in Virginia until 1887.³ But since the enactment of the Code of 1887, voluntary partition between coparceners has been included within the express terms of the statute of Conveyances, and must be by *deed*.⁴ If the partition be by decree of court, it will be remembered, it is enacted that the decree confirming the partition or allotment shall vest in the respective parties, between or to whom the partition or allotment is made, the title to their shares in like manner and to the same extent as if the said decree ordered such title to be conveyed to them and the conveyance was made accordingly.⁵

§ 1204. Derivative or Secondary Common Law Conveyances—Enumeration.

Secondary or derivative conveyances are so called, as we have seen, because they suppose some prior transaction touching the same subject between the same parties, or by one of them; or, as Blackstone says, presuppose some other conveyance precedent; and only serve to enlarge, confirm, alter, restrain, restore, or transfer the interest granted by such original conveyance.¹

The derivative or secondary conveyances are, (1) Release; (2) Surrender; (3) Confirmation; (4) Assignment; and (5) Defeasance.²

3. 2 Min. Insts. 782, 783; 2 Lom. Dig. 134; Bryan v. Stump, 8 Gratt. (Va.) 241, 56 Am. Dec. 139; Bolling v. Teel, 76 Va. 487; Dooley v. Baynes, 86 Va. 649, 10 S. E. 974; Nicholas v. Nicholas, 100 Va. 660, 42 S. E. 669, 866.

4. Va. Code, 1904, § 2413. See Townsend v. Outten, 95 Va. 536, 28 S. E. 958.

5. Va. Code, 1904, § 2565; ante, §§ 963, 965.

1. Ante, § 1197; 2 Min. Insts. 783; 2 Bl. Com. 324, et seq.; 2 Lom. Dig. 135, et seq.

2. Ante, § 1197.

(1324)

§ 1205. I. Release.

A release, in the most general sense, is the *discharge of a man's right*, whether it be of his right to actions, personal, real, or mixed, or of the right he has in lands or tenements. "Releases," says Littleton, "are in divers manners, viz.: releases of all right which a man hath in lands or tenements, and releases of actions, personal and real, and other things."¹

It is with releases in the former of Littleton's senses, namely, as a mode of conveyance of rights in lands or tenements, that we have now to do. In this sense, a release is defined to be a discharge or a conveyance of a man's *right* in lands or tenements to another that hath some former estate therein.²

Brief as is Littleton's treatise on tenures, he illustrates the nature of the release by a form:

"Releases of all the rights which men have in lands or tenements, etc., are commonly made in this form or to this effect:

"Know all men by these presents, that I, A of B, have remised, released, and altogether from me quitclaimed to C of D, all the right, title, and claim which I have, or by any means may have, of and in one messuage, with the appurtenances, in F," etc.

Upon which Coke's comment is: "Here Littleton sheweth precedents of releases of right; and precedents doth both teach and illustrate, and therefore our student is to be well stored with *precedents* of all kinds."³

In Virginia, by statute, all this and more is embraced by the words "the said grantor releases to the said grantee all his claims upon the said lands,"⁴ which, it is held, are effectual to convey all the right, title and interest of the grantor in the premises released, whether he were at the time *in possession* of the premises or not.⁵

1. 2 Th. Co. Lit. 451; 2 Min. Insts. 783.

2. 2 Min. Insts. 783; 2 Bl. Com. 324.

3. 2 Th. Co. Lit. 452; 2 Min. Insts. 784.

4. Va. Code, 1904, § 2439.

5. Harman v. Stearns, 95 Va. 62, 27 S. E. 601.

§ 1206. **Same—Several Ways in Which a Release May Enure or Operate—Enumeration.**

Releases, as conveyances of land, or transfers or discharges of rights therein, in respect to their operation, are divided at common law into four several sorts, viz.: (1) Releases that enure by way of passing a right,—*de mitter le droit*; (2) Releases that enure by way of passing an estate,—*de mitter l'estate*; (3) Releases that enure by way of enlarging an estate,—*d'enlargir l'estate*; and (4) Releases that enure by way of extinguishing a right,—*d'extinguisher le droit*,¹ to which may be added, (5) A more modern kind, known as a *quit claim deed*.²

§ 1207. **Same—1. Release Enuring by Way of Passing a Right.**

Releases are said to enure by way of passing a right (*de mitter le droit*), where nothing but the *bare right* passes, of which the most frequent instance is that of *disseisee to disseisor*. In a release of this kind *no words of limitation* are requisite, even at common law; for if made for a day, or an hour, it is as strong as if made to the releasee and his heirs for ever. But it is indispensable that the releasee should be *in possession*, either of the land, or of a reversion or remainder therein; and that not of a term of years, but of a *freehold*, albeit it be a wrongful one, as in case of the disseisor. The lessee for years is only the bailiff of the freeholder, on whom the entry and action must be, and the latter only therefore is capable of receiving a release of the right.¹ But *no privity* is requisite for such a release, as it is in case of a release enuring by way of *enlargement*.² Hence a disseisee may release his outstanding right to the disseisor's tenant for life.³

1. 2 Min. Insts. 784; 2 Bl. Com. 324, 325; 2 Th. Co. Lit. 451, n. (A), 459, et seq.

2. Post, § 1211.

1. 2 Min. Insts. 784, 785; 2 Th. Co. Lit. 459, et seq., n. (W); Gilbert, Ten. 54.

2. Post, § 1209. And of course no livery of seisin is required since the releasor is not in possession.

3. 2 Th. Co. Lit. 464, 465; 2 Min. Insts. 785.
(1326)

The common law requires that the releasee should have *possession* of the land, or at least of an undivested right therein, by way of reversion or remainder, in conformity with that ancient maxim of the law which forbids a right of entry, or a *chose in action*, to be granted or transferred to a stranger, whereby, says Lord Coke, "is avoided great oppression, injury, and injustice."⁴ But in Virginia, at least where the release is in the statutory form, namely, "the said grantor (or the said) releases to the said grantee (or the said) all his claims upon the said lands,"⁵ it is held that the release shall operate to convey all the right, title and interest of the grantor in the premises released, whether the grantor or the grantee be in possession of the land.⁶

§ 1208. Same—2. Release Enuring by Way of Passing an Estate.

When two or more persons become seised of the same estate by a *joint title*, either by contract or descent, as joint tenants or coparceners, and one of them releases his right to the other, such release is said to enure by way *de mitter l'estate*, of passing an estate; for where two several persons come in by the same feudal contract, one of them may discharge to the other the benefit of such contract by a release, because no notoriety is needful, for there was a sufficient notoriety in the prior feudal contract. Thus, two coparceners come into one entire feud descending from their ancestor, and therefore they may release privately to each other without any notoriety, because they take by the former descent, which established them in possession. But since coparceners do also transmit distinct estates to their children, they may also pass their estates by distinct feoffments. But joint tenants can only pass their estates to one another by release, for they all come in by the first feudal contract; and therefore a second feoffment cannot give any further title or

4. 2 Th. Co. Lit. 464, 113, n. (K, 3); 2 Min. Insts. 785.

5. Va. Code, 1904, § 2439.

6. Harman v. Stearns, 95 Va. 62, 27 S. E. 601.

notoriety, because every person is supposed to be in by his elder title, which, in the case of joint tenants, is the original feoffment, so that a second feoffment would be useless. In releases that enure by way of passing an estate, *privity* of estate, as already explained, is necessarily supposed; but *words of inheritance* are not necessary, for the parties are not in by the release, but by the original feudal contract, which passes an inheritance to all of them, and the release only *discharges* the right of one of them.¹

One *tenant in common* cannot release to his companion, because they have *distinct freeholds*, but they must, at common law, pass their estates by feoffment and livery of seisin; for as their estates were or may have been, created by different acts and different liveries, they must also convey to each other by distinct liveries.²

But under the Virginia *statute of Grants*, even though the deed be not good as a *release*, it may operate as a *grant*.³ It would seem, however, in Virginia not to be necessary to invoke the statute of Grants at all, if the release is in the statutory form, described in the previous section.⁴

§ 1209. Same—3. Release Enuring by Way of Enlarging an Estate.

Releases enure by way of *enlargement of an estate* when the possession and inheritance are separated for a particular time; and he who has the reversion and inheritance releases all his right and interest in the lands to the person who has the particular estate. Such releases are said to enure *by way of enlargement*, and to be equal to an entry and feoffment, and to amount to a grant and attornment, and *no livery* is possible, at least if the releasee already have a *freehold estate*.¹

1. 2 Min. Insts. 787; 2 Th. Co. Lit. 499, n. (Z, 2).

1. 2 Min. Insts. 786; Gilbert, Ten. 72, et seq.; 2 Th. Co. Lit. 514, n. (T, 3).

2. 2 Min. Insts. 786; 2 Lom. Dig. 137; Gilbert, Ten. 74.

3. Va. Code, 1904, §§ 2417, 2418; 2 Min. Insts. 787.

4. Va. Code, 1904, § 2439; *Harman v. Stearns*, 95 Va. 62, 27 S. E. 601.

(1328)

That a release may operate by way of enlargement, at common law, three circumstances are requisite: (1) That the releasee should have a vested estate in possession; (2) That the releasor should have a *vested estate* in reversion or remainder, expectant *mediately or immediately*, upon the estate of the releasee; (3) That there should be a *privity of estate* between the releasor and the releasee.²

The instances of such releases show that it is not sufficient that the releasee should have a mere inchoate executory interest, as an *interesse termini*, or a contingent remainder, or any other executory and contingent interest, nor that he should have a *mere right* or title of entry, as a lessee for life, after he has been disseised, or a lessee for years, after he has been ousted, and while his interest remains a mere right or title of entry. But a release may be made to a tenant at will or by *clegit*, or to a lessee after he has made an underlease for years; but not to a tenant by sufferance, nor to a trespasser in possession.³

There must subsist between releasor and releasee, the relation of lessor and lessee, or of particular tenant and remainderman or reversioner, so that there may be a *privity* of tenure between them. And for the purpose of this doctrine the *assignee* or representative of the lessee stands in the place of the lessee; and the assignee or representative, whether *heir* or *devisee*, of the reversioner, stands in the place of the reversioner; and the ability of making, and capacity of receiving, such enlargement by release continues, although the lessee, etc., or his assignee, create a particular estate derived out of his own estate; and although the reversioner create a particular estate, which is interposed between the interest of the particular tenant and the reversion; for notwithstanding such particular estates, there is a *continuing privity* between the lessee or his assignee, on the one hand, and the reversioner or remainderman, or his assignee, on the other. But it should be observed, that an estate created out of a particular estate is not, *during such particular estate*, capable of en-

2. 2 Min. Insts. 787; 2 Th. Co. Lit. 499, n. (Z, 2).

3. 2 Min. Insts. 787; 2 Th. Co. Lit. 499, n. (Z, 2), 503, et seq.

largement by release of the remainder or reversion expectant on such particular estate, because in such case there is *no privity*. The material rule applicable to the subject seems to be, that the particular estate, the remainder or remainders, and the reversion, are all parts of the same estate.⁴

Releases which operate by enlargement of estate require, at common law, the same technical words of limitation as feoffments or grants.⁵ But in Virginia technical words of inheritance are dispensed with in all conveyances, devises or grants of real estate.⁶

If the deed, for want of some needful requisite of *privity* or the like, cannot take effect as a release at common law, it may perhaps be sustained as a *statutory release*;⁷ or in any event it will operate as a grant under the statute of Grants.⁸

§ 1210. Same—4. Release Operating by Way of Extinguishment.

A release enures by way of *extinguishing* a right where it *destroys* the right instead of *passing* any thing to the releasee. It operates thus because, for some reason, it cannot in law operate to pass what it purports to release, and it is therefore construed, according to the maxim *ut res valeat magis quam pereat*, to *extinguish* the right which it cannot transfer.¹

Thus, if a tenant for life is disseised, and the lessor releases the reversion to him in fee, the release cannot at common law *pass* the reversion because the releasee is not in possession, but *ut res valeat*, it operates to *extinguish* it and the rent along with it.²

4. 2 Min. Insts. 787, 788; 2 Th. Co. Lit. 499, n. (Z, 2); 2 Lom. Dig. 137, 138; 2 Bl. Com. 164.

5. 2 Min. Insts. 788; 2 Lom. Dig. 238.

6. Va. Code, 1904, § 2420.

7. Va. Code, 1904, § 2439; ante, § 1207; *Harman v. Stearns*, 95 Va. 62, 27 S. E. 601.

8. Va. Code, 1904, §§ 2417, 2418; 2 Min. Insts. 788.

1. 2 Min. Insts. 788.

2. 2 Min. Insts. 788; 2 Th. Co. Lit. 389, et seq., 493, n. (R, 2); 2 Lom. Dig. 138. So also, where a landlord releases the rent to his (1330)

A married woman's release of her contingent dower interest by uniting in her husband's deed or contract to convey,³ or the release of a *contingent remainder* by the remainderman to one in possession,⁴ are instances of this sort of release; and so is the release of a power of appointment.⁵

§ 1211. Same—5. Quitclaim Deed.

The quitclaim deed, as used in this country, is a development of the common law *release*, having acquired its name from one of the words commonly used in such instruments.¹ It is used sometimes in cases where the common law release would operate by way of *enlarging the estate*, and sometimes where such release would enure by way of *passing a right*.

The quitclaim deed purports to convey merely whatever title to the land the grantor may have, and its use excludes any implication that he has a *good title*, or indeed *any title at all*.²

Hence, it contains no covenants of title, and in Virginia, as in some of the other states its employment is deemed in itself *notice* to the purchaser of a possibly defective title, and puts him upon inquiry, so that he cannot claim to occupy the position of a *bona fide* purchaser,³ though the better view seems to be that this conclusion is not justified by the purpose or the language of the quitclaim deed.⁴

tenant, the latter cannot at once both pay and receive it, and so the release can pass nothing, but it *extinguishes* the rent. 2 Min. Insts. 788; 2 Lom. Dig. 138.

3. Ante, § 313.

4. Ante, § 803.

5. Post, § 1345.

1. Ante, § 1205.

2. 2 Tiffany, Real Prop., § 377; San Francisco v. Lawton, 18 Cal. 465, 79 Am. Dec. 187; Garrett v. Christopher, 74 Tex. 453, 15 Am. St. Rep. 850; Kerr v. Freeman, 33 Miss. 292.

3. Va. & Tenn. Coal & I. Co. v. Fields, 94 Va. 102, 26 S. E. 426; Garrett v. Christopher, 74 Tex. 454, 15 Am. St. Rep. 850; Peters v. Cartier, 80 Mich. 124, 20 Am. St. Rep. 508; Steele v. Sioux Valley Bank, 79 Ia. 339, 18 Am. St. Rep. 370; Johnson v. Williams, 37 Kans. 179, 1 Am. St. Rep. 243; 2 Tiffany, Real Prop., § 482.

4. 2 Tiffany, Real Prop., § 482; Moelle v. Sherwood, 148 U. S. 21; Brown v. Banner Coal, etc., Co., 97 Ill. 214, 37 Am. Rep. 105; Fox v. (1331)

The quit claim deed has an advantage over the common law release in that it is not necessary for the former that the grantee be in possession,⁵ but it seems to have in Virginia no advantage in this particular over the release in statutory form.⁶

§ 1212. II. Surrender.

A surrender (*sursumredditio*) or rendering up, is of a nature directly opposite to a release; for as a release operates by the transfer or discharge of a *right*, usually to one in possession of the land, so a surrender is the yielding up of the *possession* to him who has the outstanding right. Thus, if the landlord relinquishes his reversion to his tenant for life or years, it is a *release* (operating by enlargement); whilst if tenant for life or years gives up his possession to the landlord, who has the reversion, it is a surrender.¹

A surrender is defined to be a yielding up of the possession of an estate for life or years to him that hath the *immediate* reversion or remainder, wherein the particular estate may *merge* or *drown*, by mutual agreement between them.²

The proper words of a surrender are *surrender*, *grant*, and *yield up*, but any form of words by which the intention of the parties is sufficiently manifested will operate as a surrender. Thus, if lessee for years *remise*, *release*, *discharge*, and *quit-claim* to lessor his right, title, and interest in and to the lands;

Hall, 74 Mo. 315, 41 Am. Rep. 316; Chapman *v.* Sims, 53 Miss. 154; Nidever *v.* Ayers, 83 Cal. 39. But even in states where the *grantee* in a quitclaim deed is himself charged with *notice* of defects, a purchaser from him for value is not so charged, for then the occurrence of one quitclaim deed in the chain of title would render the title practically unmarketable. 2 Tiffany, Real Prop., § 482; Sherwood *v.* Moelle (U. S. C. C.) 36 Fed. 478; Meikel *v.* Borders, 129 Ind. 529; Winkler *v.* Miller, 54 Ia. 476.

5. 2 Tiffany, Real Prop., § 377; Spaulding *v.* Bradley, 79 Cal. 449; Kerr *v.* Freeman, 33 Miss. 292.

6. Va. Code, 1904, § 2439; Harman *v.* Stearns, 95 Va. 62, 27 S. E. 601.

1. 2 Min. Insts. 789.

2. 2 Min. Insts. 789; 2 Bl. Com. 328; 2 Th. Co. Lit. 651.
(1332)

or if lessee for life *leases* to lessor for lessee's life, it will amount to a surrender.³

§ 1213. Same—Possession of Surrenderor.

The person who surrenders must be *in possession*. Hence, a tenant for life disseised, or a tenant for years ousted, cannot surrender to his lessor *before re-entry*, because he has nothing *but a right*. So, a lessee for years who has never entered, and has, therefore, only an *interesse termini*, cannot surrender; nor can a widow entitled to dower, before her dower is assigned. An estate at will is also not surrenderable; but that seems to be because any act of surrender is regarded as being more fitly construed to be a determination of the will.¹

§ 1214. Same—Estate of Surrenderee.

The person to whom the surrender is made must have a greater estate *immediately* in reversion or remainder, in which the estate surrendered may merge; that is, it must be *in law* greater, as a reversion and remainder are always deemed to be, in comparison with the particular estate. Thus, a lessee for years may surrender to him who has the reversion only for years, even though the lease be for several years, and the reversioner has it for only one, or a less term still. Hence, also, before a lessee enters, having only an *interesse termini*, his surrender to the lessor is void as a surrender, not only because the lessee has *no possession*, as we have seen, but because the lessor has *no reversion*. The reversion or remainder, it will be observed, must be *immediate*. Thus, if A, lessee for thirty years, demise to B for ten, B cannot surrender to the original lessor, the owner of the fee simple, because the reversion is not im-

3. 2 Min. Insts. 789; 2 Th. Co. Lit. 551, n. (A); *Smith v. Mapleback*, 1 T. R. 441; *Scott v. Scott*, 18 Gratt. (Va.) 150.

1. 2 Min. Insts. 789, 790; 2 Th. Co. Lit. 554, n. (D); 2 Bl. Com. 326. But the possession of a sublessee is the possession of the lessee. 2 Min. Insts. 790; post, § 1214.

mediate; but if A surrender his lease to his lessor, the reversion of the latter being then immediate, B may surrender to him.¹

§ 1215. Same—Privity of Estate between Surrenderor and Surrenderee.

A *privity of estate* between the parties is essential, for else there would be no immediate reversion or remainder in which the estate surrendered might merge. Thus, if tenant for thirty years make a lease for ten, and both join in a surrender to the reversioner in fee, the surrender is good for both the estates; and yet, as we have seen, the lessee for ten years could not surrender by himself, for *want of privity*; but when the other joins with him, his surrender shall be taken in law to precede, and that of the lessee for ten years to follow, which shall then be good.¹

§ 1216. Same—Doctrine as to Livery of Seisin.

Livery of seisin is not, at common law, necessary to the surrender of a freehold, nor is entry on the part of the surrenderee to the surrender of a term; for there is a privity of estate between the parties, their several interests being indeed parts of the same estate; and livery or entry having been once made at the creation of it, there is no need of it as between the parts afterwards.¹

A surrender is perfected by the *bare grant* in the way of surrender; for although the assent of the surrenderee is necessary to impart *mutuality* to the transaction, yet that consent is *presumed*, as it is in all conveyances (seeing that they *import a benefit*), until the contrary appears.²

§ 1217. Same—The Written Evidence of Surrender.

The common law requires no writing to make a surrender

1. 2 Min. Insts. 790; 2 Th. Co. Lit. 552, n. (B), 511, n. (Q, 3); 2 Bl. Com. 326.

1. 2 Min. Insts. 790; 2 Th. Co. Lit. 554, n. (D); 2 Plowd. 541.

1. 2 Min. Insts. 790; 2 Th. Co. Lit. 551, n. (A); 2 Bl. Com. 326.

2. 2 Min. Insts. 790, 791; 2 Th. Co. Lit. 551, n. (A); Sheppard's Touchst. 301, n. (3).
(1334)

good. Like all other conveyances where an actual and visible possession may be transferred, it may be by parol. But since the statute of Frauds and Perjuries in England, 29 Car. II, c. 3, §§ 1, 2, 3, the policy of having a deed or note in writing as evidence of surrenders and also of assignments, has in all cases been insisted on; and in Virginia, it will be remembered, that no estate of inheritance, nor of freehold, nor for a term of more than five years in lands, can be conveyed except by deed or will.¹ Hence the mere *cancellation* of a lease for life, or for a term exceeding five years, with intent ever so emphatically declared, does not operate a surrender, nor revest the land in the lessor.²

It must, moreover, be remembered, that although, for want of privity or other reason, a transfer *by deed* of a lease in possession, or of a mere right, may not operate as a *surrender*, nor be accompanied by the incidents of one, yet under the statute allowing any interest in or claim to real estate to be disposed of by deed or will, it will operate *as a grant* or transfer of the interest.³

§ 1218. Same—Doctrine of Surrender in Law.

A surrender may be either *in deed*, that is, by express words, or it may be *in law*. A surrender *in law* is where, by the legal effect of the transaction between the parties, a surrender must have been in their contemplation, and is, therefore, implied, being as Lord Coke expresses it, “wrought by consequent, by operation of law.”¹

Thus, if the lessee for life or years, or the assignee of either, takes a *new lease* of the reversioner, whether for a greater or shorter term than before,—to himself alone, or to himself and another,—in the same or in another right;—in short, wherever the first lease and the second cannot *subsist together*, there is a

1. Va. Code, 1904, § 2413; 2 Min. Insts. 791.

2. Ante, § 1190; 2 Min. Insts. 791; 2 Th. Co. Lit. 551, n. (A); Grayson v. Richards, 10 Leigh (Va.) 61.

3. Va. Code, 1904, §§ 2417, 2418; 2 Min. Insts. 791.

1. 2 Min. Insts. 791; 2 Th. Co. Lit. 555.

surrender in law of the first; for the parties, by making a contract of as high a nature for the same thing, must have tacitly consented to dissolve the former; for without the dissolution of that, the lessor could not grant the interest which the second lease purports to pass, and the lessee has accepted. Hence, in cases where no such incompatibility exists between the continuance of the first lease and the second transaction, but where they may stand together, there is *no surrender in law*. If, therefore, the lessee only license the lessor to enter upon the land in order to make a feoffment thereof, or for any specific purpose, not inconsistent with the continuance of the lease; or if the second lease be of another, and not the same thing as the first, as where the first lease is *of the land*, and the second *of a rent or other profit* out of the land; or if the second lease is not to begin until the first ends; or if the second lease is not merely voidable, but *void*;—in all these cases there is no surrender in law.²

§ 1219. Same—Effect of Surrender.

Upon surrender, there is not only a *merger*,¹ but all stipulations and covenants contained in the lease surrendered, must come to an end with the lease itself; and this is alike true, whether it be a surrender in law or in deed.²

But covenants *already broken* are of course not discharged by the surrender; nor are grants of interest, or charges created by the lessee during the continuance of the lease, in any wise affected.³

2. 2 Min. Insts. 791, 792; 2 Th. Co. Lit. 554, et seq., notes; Sheppard's Touchst. 301; Preston v. McCall, 7 Gratt. (Va.) 121. It is worthy of observation that a surrender in law is in some cases of greater force than a surrender in deed. Thus, an *interesse termini* may be surrendered *in law*, by the lessee's accepting another lease from the lessor, whilst, as we have seen, it cannot be conveyed by surrender *in deed*, for want of *possession* in the lessee, and of the *reversion* in the lessor. 2 Th. Co. Lit. 554; 2 Min. Insts. 792.

1. Ante, §§ 375, 812, et seq.; 2 Min. Insts. 792, 428, et seq.

2. 2 Min. Insts. 792; Preston v. McCall, 7 Gratt. (Va.) 121.

3. 2 Min. Insts. 792; Sheppard's Touchst. 301.

(1336)

§ 1220. III. Confirmation.

A confirmation is defined by Lord Coke to be a conveyance of an estate or right *in esse*, whereby a voidable estate is made *sure and unavoidable*, or whereby a particular estate is *increased*.¹

An instance of the first branch of the definition is, if tenant for life leaseth for forty years. Here the lease for years is voidable by him in reversion, in case the tenant for life should *die during the term*; yet if the reversioner, before the death of tenant for life, confirm the estate of the lessee for years, it is then no longer voidable, but sure. The latter branch, or that which tends to the *increase* of a particular estate, may be illustrated by the case of tenant for term of years, to whom the lessor confirms *the land*, to have for term of his life or in fee simple, whereby the term for years is enlarged, in one case, to the compass of a life estate, and in the other of a fee simple.²

The proper words of confirmation are *give, grant, ratify, approve, and confirm*; but any words which plainly manifest the intent will suffice.³

The modes whereby a confirmation enures or operates are: (1) to make sure a *voidable* estate; and (2) to *enlarge* a particular estate, in which latter respect its effect is similar to that of a *release*.⁴

§ 1221. Same—Confirmation Operating to Make Sure a Voidable Estate.

A confirmation, being an approbation of, or assent to, an estate already created, by which the confirmor, as far as it is in his power, strengthens and makes it valid, it is manifest that it can have this operation only with respect to estates *voidable* or defeasible, and can have no effect on estates which are absolutely *void*. "A confirmation," says Coke, "doth not strengthen a *void*

1. 2 Th. Co. Lit. 516; 2 Bl. Com. 325; 2 Min. Insts. 792.

2. 2 Min. Insts. 793; 2 Bl. Com. 325, 326; 2 Th. Co. Lit. 538.

3. 2 Min. Insts. 793; 2 Bl. Com. 325; 2 Th. Co. Lit. 517.

4. Ante, § 1209.

estate; for a confirmation may make a voidable or defeasible estate good, but it cannot work upon an estate that is void in law."¹

For a confirmation operating to make sure a voidable estate, no *privity* is necessary as it is in the case of a release (or confirmation), enuring by way of enlargement. Hence, if my tenant for life makes a lease for years, although I cannot *release* to the lessee for years for want of privity, yet I may *confirm* his estate, so as to make it unavoidable. So I cannot *release* to the *termor* of my disseisor, because there is *no privity* between us, but only a *bare right*; but I may *confirm* the termor's existing estate. Confirmation requires no words of limitation, such as *heirs*; for if the confirmee's estate be made sure, even for a minute, it can never be defeated by the confirmor, whilst, without words of limitation, a release, at common law, enlarges the releasee's interest merely to a life estate.²

§ 1222. Same—Confirmation Operating to Enlarge a Particular Estate.

The enuring of a confirmation to enlarge a particular estate is, as Gilbert, C. B. observes, foreign to its business and purpose, and is, indeed, due to the special words employed, and not to the nature of the conveyance. So far as it thus operates, a confirmation differs little from a *release* enuring by way of *enlargement*; and, like that, requires: (1) That the confirmee should have a *vested* estate in *possession*, and not a mere right; (2) That the confirmor should have a *vested* estate in reversion or remainder, expectant mediately or immediately on the estate

1. 2 Th. Co. Lit. 516, n. (A); 2 Min. Insts. 793. This operation of a confirmation (namely, to make sure a voidable estate) is the proper work of such a conveyance. If it goes to *enlarge* the confirmee's estate, it is by force of the words of enlargement which are employed, and is foreign to its proper business and object. Gilbert, Ten. 75; 2 Th. Co. Lit. 516, n. (A); 2 Min. Insts. 793.

2. 2 Min. Insts. 793, 794; Gilbert, Ten. 75, et seq.; 2 Th. Co. Lit. 521, et seq.
(1338)

of the confirmee; and (3) That there should be a *privity of estate* between the confirmor and confirmee.¹

§ 1223. Same—Requisites of a Confirmation.

For a valid confirmation, it is essential that there be: (1) A precedent estate in the confirmee, rightful or wrongful, in his own or in another's right; (2) in the confirmor an estate of his own, out of which the confirmation may enure; and (3) a deed.¹

In regard to the latter, it seems always to have been necessary, even at common law, that a confirmation should be evidenced by *deed*, there being no visible and notorious change of possession accompanying it. And in Virginia, it may be supposed to be specially required by the equity, at least, of the statute of Conveyances, that no estate of inheritance or of freehold, or for a term of more than five years in lands, shall be conveyed, unless by deed or will.²

It may be proper in conclusion, again to reiterate the remark so repeatedly made, that in consequence of the statute allowing "any interest in or claim to real estate" to be disposed of by deed or will, any deed which, for any reason, cannot take effect as a confirmation, may generally operate as a *grant*.³

§ 1224. IV. Assignment.

An *assignment*, in a general sense, is a transfer, or making over to another, of the right one has in *any* estate or property; but in the sense of a conveyance of lands or tenements, it is usually applied to an estate for *life or years*. It differs from a lease only in this: that by a lease one grants an interest *less* than

1. Gilbert, Ten. 75; 2 Min. Insts. 794; 2 Bl. Com. 326; 2 Th. Co. Lit. 399, n. (Z, 2). See ante, § 1209. No livery is necessary at common law, nor indeed possible, if the confirmee is already in possession of a *freehold estate*.

1. 2 Min. Insts. 794.

2. Va. Code, 1904, § 2413; 2 Min. Insts. 794. The *deed* is always necessary at common law in cases where no livery of seisin can be given. Ante, § 142.

3. Va. Code, 1904, §§ 2417, 2418; 2 Min. Insts. 794, 795.

his own reserving to himself a reversion; in an assignment he parts with the *whole property*, and the assignee stands for many purposes in the place of the assignor.¹

The proper words of assignment are *assign, transfer, and set over*, but not to the exclusion of any other language that plainly expresses the idea. Thus, if one *leases* the land to another for his *entire term*, reserving a rent, or if he *underlets*, it is an assignment, and not an underlease, although a rent be reserved.²

All that is essential to make a good assignment is the *intention* to place the beneficiary exactly in the place of the assignor. If his terms of holding are different, as at an increased rent, though the *whole estate* is transferred, it is not an assignment but an underlease.³

§ 1225. Same—Mode of Assignment.

At common law, an assignment of a lease, whether for life or years, may be made *by parol* only, although if it were for *life*, it must be accompanied (as the transfer of every freehold in lands must be) by *livery of seisin*. But since the statute of Frauds and Perjuries, 29 Car. II, c. 3, §§ 1, 2, 3, the policy has been to require it to be, in *all cases* (in pursuance of § 3), even where the interest assigned does not exceed three years, *by deed or writing*;¹ and in Virginia, it is provided that no estate of inheritance, or of freehold, or for a term of more than five years in lands, shall be conveyed *unless by deed or will*.²

There needs *no valuable consideration* to support an assignment, the liabilities incident to the lease, as to pay rent, etc., which the assignee assumes, being always sufficient.³

1. 2 Min. Insts. 795; 2 Bl. Com. 326, 327.

2. 2 Min. Insts. 795; 2 Th. Co. Lit. 566, n. (S); *Palmer v. Edwards*, 1 Dougl. 187, note; *Scott v. Scott*, 18 Gratt. (Va.) 159, et seq., 177, et seq.

3. *Dunlap v. Bullard*, 131 Mass. 161; *Post v. Kearney*, 2 N. Y. 394; *Collamer v. Kelly*, 12 Ia. 319.

1. 2 Min. Insts. 795; 2 Lom. Dig. 110, 150.

2. Va. Code, 1904, § 2413; 2 Min. Insts. 795.

3. 2 Min. Insts. 795; 2 Th. Co. Lit. 566, n. (S).

§ 1226. Same—What May Be Assigned.

An assignment, as a specific mode of conveyance, is properly applicable, it will be remembered, only to the transfer of the lessee's *whole estate*, when such estate is *for life or years*.¹

It is often used, however, in a more general sense, to signify the transfer of any estate or interest whatever in real property; and as the general principles which regulate the transaction in its more comprehensive signification are the same as those which govern it in its more limited and proper sense, there will be no need in stating those principles to discriminate between the two senses. The doctrine is, that *every* estate and interest in lands and tenements, and every present and certain estate or interest in incorporeal hereditaments, such as rents, ways, franchises, etc., may be assigned, so that if, in leases for life or years, it is intended to restrict or bar the power of assignment, it must be done by special and precise stipulations. Even though the interest be future, as a term for years to commence at a subsequent period, it may be assigned, for it is vested *in presenti*, though it is to take effect in enjoyment only *in futuro*.²

But no right of *entry* or of *action* can be assigned at common law, so that if one is disseised, and assigns his right to another before he has entered on and dispossessed the disseisor, the assignment is void; which Coke explains to be "for avoiding of maintenance, suppression of right, and stirring up of suits."³ In Virginia, however, it will be remembered that *any* interest in, or claim to *real estate*, may be disposed of by deed or will,⁴ so that the common law disability to assign rights of entry and of action as to real estate does not exist with us. And even at common law, although the assignment of such interests does not pass the *legal title*, yet it creates an equitable ownership which the court of chancery protects, and to which it gives effect.⁵

1. Ante, § 1224.

2. 2 Min. Insts. 796.

3. 2 Th. Co. Lit. 566, n. (S), 85; ante, § 537; 2 Min. Insts. 796.

4. Va. Code, 1904, § 2418.

5. 2 Min. Insts. 796. See ante, § 537.

A distinction must be noted in respect to assignability, between a *naked* power or license which is not capable of being assigned, and a power or license *coupled with an interest*, which may be. Thus, if a *stranger* has authority to cut and sell timber-trees from certain lands, he cannot assign the authority; but if a *lessee* of the land has such power conferred upon him, by assigning the lease, he may pass the power with it.⁶

§ 1227. Same—Rights and Liabilities Arising Out of the Assignment of a Lease.

These rights and liabilities depend, for the most part, upon the stipulations and conditions, express and implied, contained in the lease; and in general, forasmuch as they arise as incident to the assignment, they cease and determine when the assignee's possession ceases under the assignment. Thus, if he assigns over his interest and parts with the possession, he is no longer answerable for any rent which may accrue afterwards, nor for the breach of any of the agreements contained in the lease; not even though he should assign to a beggar, nor though the person to whom he assigns neither takes actual possession, nor receives the lease.¹

The rights and liabilities arising upon an assignment have been fully discussed elsewhere,² and the discussion need not be repeated. Suffice it to say that the general doctrine is that, in respect to the lessor and his representatives, the assignee of the *land* may have the benefit of, and is chargeable with, all the covenants contained in the lease which *run with the land*, and are broken *during the continuance of his interest*. But at common law, the assignee of the *reversion* is neither liable upon any *express* covenants contained in the lease, nor is entitled to the benefit thereof, either as against the lessee, or his assignee; a

6. Ante, § 135; post, § 1331; 2 Min. Insts. 796; 2 Lom. Dig. 151.

1. 2 Min. Insts. 796, 797; 2 Th. Co. Lit. 566, n. (S); 2 Rob. Pr. (2d Ed.) 102; *Staines v. Morris*, 1 Ves. & B. 11; *Taylor v. Shum*, 1 Bos. & P. 21.

2. Ante, §§ 420, et seq., 1131.
(1342)

doctrine which it has been found needful materially to modify by statute.³

§ 1228. V. Defeasance.

A defeasance is a *collateral deed*, made at the *same time* with a feoffment, or other conveyance, containing certain conditions, upon the performance of which the estate then created may be *defeated*. And in this manner mortgages were formerly made, the mortgagor enfeoffing the mortgagee, and he at the same time executing a *deed of defeasance*, whereby the feoffment was rendered void on repayment of the money borrowed at a specified time. And this, when executed at the same time with the original feoffment, was considered *as part of it*, and therefore only indulged; no subsequent *secret* revocation of a solemn conveyance, executed by livery of seisin, being allowed in those days of simplicity; though when *uses* were afterwards introduced, a revocation of such uses was permitted by the courts of equity. But things merely executory, or to be completed by matter subsequent, as rents, annuities, covenants, promises, and the like, were always liable to be recalled by defeasances, made subsequent to the time of their creation, by the party entitled to enjoy them.¹

A defeasance, it will be observed, differs from a condition in being contained in a *separate deed*, executed at the same time with the original, whilst a condition is contained in the *same deed*. And this diversity has led, in a great degree, to the disuse of defeasances in practice, partly because they were often employed as a cover for fraud, and so became objects of suspicion, and partly from the apprehension that, as the conveyance without the defeasance was absolute, if the defeasance were lost, the proof of the condition might be difficult, if not impossible.²

3. Va. Code, 1904, §§ 2781, 2782; ante, §§ 421, et seq., 1131; 2 Min. Insts. 797.

1. 2 Min. Insts. 801; 2 Bl. Com. 327; 2 Th. Co. Lit. 122, 123, n. (O, 3). See *Macaulay v. Smith*, 132 N. Y. 524.

2. 2 Min. Insts. 801; 2 Lom. Dig. 151, 152; Sheppard's Touchst. 396, et seq.

(1343)

The defeasance must contain sufficient words, as that *the thing shall be void* in the event designated, although no particular expressions are indispensable. But it must always be by matter as high as the thing to be defeated. Hence, an obligation *under seal* cannot be defeated or discharged by writing *unsealed*.³

§ 1229. Conveyances Operating under Statutes—The Statutes Referred to.

There are three statutes by virtue of which conveyances *inter vivos* may operate in a manner unknown to the common law. The first of these is *the statute of Uses*;¹ the second is the *statute of Grants*;² and the third is the *statute of Future Grants*.³

These statutes have had some very important and far reaching results, (1) in doing away with the necessity of *livery of seisin*, and as a consequence, (2) in making possible the creation, in conveyances *inter vivos*, of springing and shifting *executory limitations*, and (3) in *validating* conveyances which, under the rules of the common law, for the lack of some common law requirement would otherwise be of no effect.⁴

We shall now examine the several conveyances operating under each of these statutes in their order.

§ 1230. Conveyances Operating under the Statute of Uses—I. Conveyances Operating with Actual Transmutation of the Possession.

The student will recall that the *English* statute of Uses, 27 Hen. VIII, c. 10, in substance provides that wherever any person is seised *by any ways or means whatsoever* of any lands, tenements, or hereditaments to the use of another, the possession of him that is seised shall be transferred to him who has

3. 2 Min. Insts. 801; 2 Th. Co. Lit. 122, n. (O, 3); Cabell v. Vaughan, 1 Saund. 291, n. (1); Lacy v. Kynaston, 2 Salk. 575; Sheppard's Touchst. 397.

1. 27 Hen. VIII, c. 10 (A. D. 1536); Va. Code, 1904, § 2426.

2. 8 & 9 Vict., c. 106 (A. D. 1845); Va. Code, 1904, §§ 2417, 2418.

3. Va. Code, 1904, § 2418.

4. Ante, §§ 824, et seq., 828, et seq.

the use, for the estate he has in the use, as effectually and fully as if he had been enfeoffed of the land with livery of seisin.¹

It will likewise be remembered that conveyances operate under the statute in two ways, either *with* or *without* actual transmutation of the possession to a third party for the use of the beneficiary.²

Conveyances which operate under the statute of Uses, *with* actual transmutation of the possession, suppose that a conveyance operating *at common law* is made by the grantor to the intended *trustee* (as by feoffment, lease and release, fine, common recovery, etc.), accompanied by a declaration of the uses and trusts to which it is designed the trustee shall be seised. For example, a feoffment, with livery of the land, is made by the grantor, whom we may call A, to the trustee, T, and his heirs, *in trust for, or to the use of* (the form of the phrase is immaterial), *cestui que use*, C, and his heirs. The common law operates to transfer the land, by means of the feoffment and livery, to T, and then the statute takes the *seisin* out of him, and transfers it to C.³

This class of conveyances is employed in England in marriage settlements, and wherever it is desired to create *future uses* in favor of persons not in being or not ascertained; and there is a grave doubt whether the statute applies to execute such uses when created by *bargain and sale*, because, it is said, *cestui que use* cannot, in the nature of things, have supplied the valuable consideration which the conveyance requires.⁴

This statement resolves a question which is liable to perplex the student, namely, why resort to a feoffment, or other common law conveyance, to vest the land in one person, in order that the statute may take it out of him and transfer it to another? Why not at once convey it to that other? The statute must of course have included uses declared on such conveyances, in order to accomplish its purpose of abolishing uses altogether;

1. Ante, § 451; 2 Min. Insts. 804.

2. Ante, § 451; 2 Min. Insts. 804, et seq.

3. 2 Min. Insts. 805; ante, § 451.

4. 2 Min. Insts. 208, 805; Gilbert, Uses, 163, n. (5), 398, n. (2).

(1345)

but the question relates rather to the reasons which influence grantors to choose the apparently roundabout method of conveyance by feoffment to uses, instead of some more direct mode of transfer, as by simple feoffment and livery immediately to the intended beneficiary. It will be perceived, that by conveying thus by feoffment, etc., to the uses declared, there is created in the feoffee, etc., what may be denominated a kind of *reservoir of seisin*, which will apply to (or *serve*, as it is termed), any future uses which are limited agreeably to law, without the embarrassment arising from the necessity that *cestui que use* should be *within the consideration*. Hence it is that this mode of conveyance is in England invariably used in family settlements, which often contemplate very remote limitations, and always limitations to persons not in being.⁵

But the *Virginia* statute of Uses does not embrace within its terms any uses created with actual transmutation of the possession, but confines itself strictly to those created *without* such transmutation, which we are now to consider.⁶

§ 1231. II. Conveyances Operating under the Statute of Uses, without Actual Transmutation of Possession.

Since, prior to the enactment of the statute of Uses, a use might be raised, either by a declaration contained in or annexed to a feoffment or other conveyance transmuting the possession of the land to another person, who was then a trustee, for the uses declared; or, as it was usual to style him, *feoffee to uses*; or by any *contract* founded upon an adequate consideration, without any actual transfer of the possession, the bargainor being himself, in that case, the trustee; so also under 27 Hen. VIII, c. 10, which embraces *all uses*, howsoever created, we have a similar division.¹ But the *Virginia* statute, as has been pointed out, embraces only the latter class.²

5. 2 Min. Insts. 805, 806.

6. Va. Code, 1904, § 2426.

1. 2 Min. Insts. 806.

2. Va. Code, 1904, § 2426.

The *adequate consideration* on which a contract or covenant must be founded, in order to raise a use before the statute, as well as since, may be either, first, a consideration of *value*, in which case the instrument is known as a *bargain and sale*; or it is, secondly, a consideration of *natural love and affection* for the covenantor's wife, or some near relative, when the instrument has been always designated as a *covenant to stand seised*. And these two exhaust the modes of raising uses prior to the statute without *actual transfer* of the possession, and *in principle* exhaust such modes under the statute. There is, however, under the statute, a third mode, according to the usual classification, whereby a bargain and sale is made for a year, and the bargainee being thus put statutorily into possession for a year, is thereby enabled to receive a release enuring by *way of enlargement*;³ and to this the name of *lease and release* has been given. We are to consider, then, under the head of conveyances operating without transmutation of possession, (1), Conveyance by bargain and sale; (2), Conveyance by covenant to stand seised; and (3), Conveyance by lease and release.⁴

§ 1232. Same—1. Conveyances Operating as a Bargain and Sale.

A bargain and sale is a contract by which one agrees for any *valuable* consideration (it is not indispensable that it should be *money*, as Lord C. B. Gilbert insists), to *stand seised* of his lands to the use of another. At common law it might have been by *words only*, without writing; but by statute 27 Hen. VIII, c. 16, it was required, if it were for an estate of inheritance or of freehold, to be by *deed* indented and *enrolled*; and by the statute of Frauds and Perjuries, 29 Car. II, Car. II, c. 3, §§ 1, 2, 3, it must be *in writing*, even though it relates to estates for years only, if it exceed three years.¹ And under the *Virginia* statute

3. 2 Min. Insts. 787.

4. 2 Min. Insts. 806.

1. 2 Min. Insts. 806; Gilbert, Uses, 187, n. (10), 95, n. (5); 2 Th. Co. Lit. 578, n. (B).

of Conveyances, if it exceed five years it must be by *deed*.²

By such a contract a use arises to the bargainee, to whom the statute immediately passes the legal estate and possession of the land for the estate or interest that he had in the use, without any entry, or other act on his part.³

The proper technical words of this conveyance are *bargain and sell*; but they are by no means essential to its operation.⁴ The material thing is a *valuable consideration*, and, therefore, if for such consideration a man, without making livery of seisin, covenant to stand seised, or gives and enfeoffs, or aliens, grants and demises, it will operate as a *bargain and sale*.⁵

The consideration, if valuable, may be a trifling one, and the actual amount need not be stated; nor, if it be expressed in the deed, need it be actually paid, no averment or proof to the contrary being admitted. Indeed, it seems not absolutely necessary that the consideration should be mentioned at all in the deed, as extrinsic proof of any valuable consideration *not inconsistent with the deed*, is admissible.⁶

For every conveyance under the statute of Uses, there must be *a use*, and a *seisin to serve it*. Hence, a person *not seised* (that is, not possessed of a *freehold*), cannot convey by bargain and sale. Thus, whilst all corporeal hereditaments, of which the

2. Va. Code, 1904, § 2413.

3. 2 Min. Insts. 807; 2 Th. Co. Lit. 578, n. (B), 461, n. (Q).

4. For form of conveyance by bargain and sale, see ante, § 1107, note.

5. 2 Min. Insts. 807; 2 Th. Co. Lit. 578, n. (B); Rowlett v. Daniel, 4 Munf. (Va.) 473. Indeed, it may perhaps be doubted, since the Virginia statute of Conveyances, Va. Code, 1904, § 2413, has required the conveyance to be by *deed* (that is, *under seal*), if for more than five years, whether the requirement of a deed has not abrogated the necessity for any valuable consideration to support a bargain and sale,—at least as between the parties, inasmuch as a *seal* imports a valuable consideration at common law.

6. Ante, § 1157; 2 Min. Insts. 807; 2 Th. Co. Lit. 579, n. (B), 9, n. (E); Gilbert, Uses, 96, n. (6), 462; Eppes v. Randolph, 2 Call (Va.) 125, 152; Duval v. Bibb, 4 Hen. & M. (Va.) 113, 4 Am. Dec. 506; Harvey v. Alexander, 1 Rand. (Va.) 219, 10 Am. Dec. 519. (1348)

bargainor has a seisin, and all incorporeal hereditaments in *actual* existence, may be conveyed thereby; and whilst one seised of a freehold in lands may, by bargain and sale, convey a term for years, no term for years *already created* can be so transferred, because the owner has no *seisin*, as the statute requires.⁷

Contingent uses limited to a person not *in esse*, or not ascertained, it is said, cannot be raised by bargain and sale, because the intended *cestui que use* cannot provide the consideration; and it is asserted that a consideration paid by other parties, as for example, by the precedent tenant for life, would not suffice;⁸ and yet it is admitted, that when there are several bargainees, as A, B, and C, a consideration furnished by any one will enure to all; nay, where the remainder is *vested*, a consideration paid by the particular tenant will enure to the successors. Thus, if A agree for a valuable consideration *paid by* B, to stand seised to the use of B for life, remainder to C, the statute will execute as well the remainder to C as the particular estate to B. It is even said that if the consideration be paid by a *stranger*, it will suffice.⁹

This question, however, is at present of little practical interest, for although such a conveyance be incapable of taking effect under the statute of Uses, it is believed that it would be unquestionably good to vest the contingent estate *as a grant*, under the statute of Grants.¹⁰

A bargain and sale (like a covenant to stand seised, and a lease and a release, operating under the statute of Uses), is said to be an *innocent conveyance*, in contradistinction to a *tortious* one.¹¹

7. 2 Min. Insts. 807; Gilbert, Uses, 492; 2 Th. Co. Lit. 578, n. (B).

8. 2 Min. Insts. 808; Gilbert, Uses, 398, n. (2), 163, note. See *supra*, note 5.

9. 2 Min. Insts. 808; Gilbert, Uses, 458, 96, n. (7). See Va. Code, 1904, § 2415, which provides that "an *immediate* estate or interest in, or the benefit of a condition respecting, any estate may be taken by a person under an instrument, though he be not a party thereto."

10. 2 Min. Insts. 808; Va. Code, 1904, §§ 2417, 2418; Rowlett v. Daniel, 4 Munf. (Va.) 473; Watts v. Cole, 2 Leigh (Va.) 662; post, § 1235.

11. Ante, § 210.

Neither of these three conveyances pass any interest but that which the seller may lawfully pass. They therefore produce no *discontinuance* when made by a tenant in tail, nor any forfeiture when made by a tenant for life. These conveyances, moreover, of themselves pass only a *use*, the legal estate and possession being transferred *by the statute*. Hence, no use can be limited upon the estate of the bargainee, etc., so as to be executed by the statute; but the second use is no more than an *equitable estate* (as all uses were prior to the statute), under the denomination of a *trust*.¹²

When the statute of Uses was enacted, its framers easily foresaw that conveyances would frequently be made by bargain and sale, being a conveyance of a private nature, not requiring the notoriety of livery; and in order to protect society against the ill consequences of such secrecy, it was enacted in the same session of parliament, by statute 27 Hen. VIII, c. 16, that such bargains and sales should not enure to pass an estate of *inheritance*, or of *freehold*, unless they were by deed indented and enrolled within six months from the date, in one of the courts of record at Westminster, or with the *custos rotulorum* of the county where the lands lay; and to this day this is the only general statute of registry in England.¹³

In Virginia, the same end is attained by requiring all conveyances to be duly admitted to record in the clerk's office of the county or corporation wherein the land is situated, in order to be valid as against *creditors* and *subsequent purchasers* for value and without notice; but recordation is not required as *between the parties*, except in the case of a married woman's conveyance of property other than her statutory separate estate, and in case of a tax deed.¹⁴

§ 1233. Same—2. Conveyance Operating as Covenant to Stand Seised.

A conveyance by covenant to stand seised, like that by bargain

12. Ante, § 463; 2 Min. Insts. 216, 808; 2 Th. Co. Lit. 581, n. (B).

13. 2 Min. Insts. 807, 808; 2 Th. Co. Lit. 579, n. (B); Gilbert, Uses, 200, et seq., 520; Williams, Real Prop. 423.

14. Va. Code, 1904, §§ 661, 2465, 2502; post, §§ 1401, 1402, et seq. (1350)

and sale, is a contract by which one agrees to *stand seised* of his lands to the use of another; but it differs from a bargain and sale in the fact that a *deed* is in all cases necessary,¹ and also in the consideration required for it, which, instead of being *valuable*, is a consideration of natural love and affection for a near relative, or a wife; friendship, long acquaintance, having been school-fellows, or even love for a *bastard* child, not being sufficient to raise a use, and therefore not sufficient for the operation of the statute. Supposing the consideration sufficient, the covenantee, by deed, acquires the use, to which the statute transfers the corporeal possession of the land, without his ever seeing it, by a kind of parliamentary magic, as Blackstone observes.²

The *consideration* is the foundation of this conveyance, and if that exist, the words "covenant to stand seised" are not essential, but may be substituted by any words demonstrative of the intent, such as grant, bargain, sell, assign, enfeoff, etc.; nor is it needful, supposing that there is the near kindred, etc., *expressly* to declare the consideration.³

It will be observed that a covenant to stand seised can raise no use in favor of strangers to the consideration; and hence, if one covenants with three persons, one of whom is his brother, to stand seised to their use, it raises a use in favor of the brother alone, and operates only to transfer the possession to him, he taking all.⁴ So, no one can transfer lands by this conveyance who cannot be seised to a use, and who has not a vested estate in possession, remainder or reversion in the lands; nor can any property be transferred by it which cannot be conveyed to uses.⁵

1. 2 Min. Insts. 809; Gilbert, Uses, 243, n. (4).

2. 2 Bl. Com. 338; 2 Min. Insts. 809; 2 Th. Co. Lit. 580, n. (B); Gilbert, Uses, 456, n. (4).

3. 2 Min. Insts. 809; 2 Bl. Com. 338, n. (59); 2 Th. Co. Lit. 580, n. (B); Gilbert, Uses, 251, n. (2), 250, n. (10); Bedell's Case, 7 Co. 40; Watts v. Cole, 2 Leigh (Va.) 662.

4. 2 Min. Insts. 809; Gilbert, Uses, 246, 457, n. (5); 2 Th. Co. Lit. 580, n. (B).

5. 2 Min. Insts. 809; 2 Th. Co. Lit. 581, n. (B).

§ 1234. Same—3. Conveyance by Lease and Release.

The conveyance by lease and release consists of two parts, namely, a lease for a short period, say a year, which, when it is consummated by *statutory* possession in the lessee, is followed by a deed of release, which operates by *way of enlargement*, enlarging the lessee's estate to the full compass of the terms of the release. This was a conveyance very well known to the common law before the statute of Uses, being employed hardly less frequently than feoffment; but at common law, the lessee, in order to qualify himself to receive the release, was obliged *actually to enter* and take possession of the premises, and then only was competent to have the reversion released to him.¹

In lease and release, taking effect under the statute of Uses, the lease is a *bargain and sale for a year*, whereby the possession is, by the operation of the statute, transferred to the lessee for a year, without any actual entry on his part, and thus he is prepared to receive a common-law release from the lessor, enuring to enlarge his estate to the extent of the terms of the release. Theoretically, therefore, the lease should be executed first; but it is immaterial how short a time may intervene, and in practice they are generally executed at the same meeting of the parties. It is said, indeed, that they may be contained in the same deed; nay, that the recital of the lease in the release is sufficient evidence of the lease, as against the releasor and those claiming under him, but not as to others, without proof that the lease once existed, and is lost.²

Indeed, in Virginia, it is expressly enacted that "every deed of release of any estate or interest, capable of passing by deeds of lease or release, shall be as effectual for the purposes therein expressed, *without the execution of a lease*, as if the same had been executed."³

As the lease operates as a bargain and sale under the statute

1. Ante, § 1209; 2 Min. Insts. 809, 787; Gilbert, Uses, 325, 228, n. (2).

2. 2 Min. Insts. 810; Gilbert, Uses, 228, 229; 2 Th. Co. Lit. 581, n. (B).

3. Va. Code, 1904, § 2427.
(1352)

of Uses, whatever is requisite to a bargain and sale is necessary to it; none can convey by it who cannot be seised to a use, nor can any property be transferred by this means, which is incapable of being conveyed to a use; and it no more creates a discontinuance or forfeiture than does a bargain and sale, or a covenant to stand seised.⁴

The conveyance by lease and release under the statute of Uses, is said to have been invented by Sergeant Moore, at the request of Lord Norris, in order to prevent some of his relations from learning from the public records, or from the notorious ceremony of livery, what disposition he should make of his estate. Had he conveyed it by feoffment at common law, the livery of seisin would have given a necessary notoriety to the transaction; if by lease and release, at common law, the need of actual entry by the lessee would have made it only a little less notorious; if he had employed a bargain and sale, the statute required an *enrolment* as to all *freeholds*, which again would have occasioned the publicity which it was desired to avoid; but by lease by bargain and sale *for a year*, the possession was in law transferred to the lessee, as if he had entered, the necessity for enrolment was obviated, and thus by two secret deeds the fee simple was conveyed. By this device the general registry of conveyances, which was contemplated by 27 Hen. VIII., c. 16, as a substitute for the notoriety of livery, was evaded, and rendered of little effect.⁵

§ 1235. Conveyances Operating under the Statutes of Grants and of Future Grants.

The statutes of Grants and of Future Grants, covering the creation of estates *in futuro* as well as *in presenti*, are found in two sections of the Virginia Code, one of which (corresponding to 8 & 9 Vict., c. 106) provides that "All real estate shall, as regards the conveyance of the *immediate freehold* thereof, be

4. 2 Min. Insts. 810; 2 Th. Co. Lit. 581, n. (B); Gilbert, Uses, 228, et seq., n. (2).

5. 2 Min. Insts. 810, 811; 2 Bl. Com. 339; 2 Th. Co. Lit. 582, n. (B); 4 Reeves, Hist. Eng. Law, 335.

deemed to lie *in grant* as well as *in livery*;"¹ and the other provides as follows: "Any interest in or claim to real estate may be disposed of by *deed* or will. Any estate may be made to commence *in futuro* by *deed* in like manner as by *will*; and any estate which would be good as an *executory devise or bequest* shall be good if created by *deed*."²

By virtue of these statutes not only is the distinction between the modes of transferring property *corporeal* and *incorporeal* abolished,³ but also the distinction, so far as the creation of executory limitations is concerned, between wills or deeds operating under the statute of Uses and other sorts of deeds; and a new and more pliant mode of conveyance created, effectual to validate transfers of real estate which, under the rules theretofore existing, might not be able to take effect as common law conveyances or conveyances under the statute of Uses, as will more fully appear in the following section.

§ 1236. Curative Effect of Conveyances Operating under the Statutes of Uses and Grants.

It is a general rule that where a conveyance is *intended* to operate in one way (*e. g.*, at common law), and for want of some needful observance, fails of effect in the way designed, it may, notwithstanding, operate in another way (*e. g.*, under a statute), if the requisites for such operation exist.¹ Thus in *Rowletts v. Daniel*,² a deed which was meant to be a *feoffment*, but for want of livery could not avail as such, was held to operate as a *bargain and sale*, a valuable consideration being mentioned in it; and in *Watts v. Cole*,³ what was designed to be a *feoffment*, but was void as such for want of livery, was allowed to take effect as a *covenant to stand seised*, there being a consideration of natural love and affection.

1. Va. Code, 1904, § 2417; 2 Min. Insts. 779, 826.

2. Va. Code, 1904, § 2418.

3. 2 Min. Insts. 779.

1. 2 Min. Insts. 780.

2. 4 Munf. (Va.) 473; 2 Min. Insts. 780.

3. 2 Leigh (Va.) 653, 662; 2 Min. Insts. 780.

Other instances of the curative effect of these statutes, especially the statute of Grants, have been seen in cases of various common law conveyances such as releases, confirmations, surrenders, etc., which for some reason have been defective, and which yet might be upheld as conveyances under the statutes of Grants.⁴

Indeed, under the statutes of Grants, every *deed*, however it was *designed* to operate, and whether there be or be not a consideration, must operate to pass the title, by way of *grant*, if not otherwise.⁵

And if the instrument is invalid as a *deed*, because of defective execution, or acknowledgment (in the case of a married woman), though it purports to be a deed, it will be given effect as a *contract in writing*, rather than that it should fail of effect altogether.⁶

§ 1237. Illustrations of Operation of Statutory Conveyances.

A few examples may serve to illustrate and make plain the operation of these statutory conveyances:

(1) A enfeoffs C in fee, with livery of seisin, but if C marries Z then to go to Y in fee (a common law conveyance of *feoffment*).

At common law the ulterior limitation to Y is *void*, because of the *re-entry* of the grantor necessary to put an end to C's estate after his marriage to Z.¹ Nor perhaps could it take effect as a *bargain and sale* under the statute of Uses, since Y is not within the consideration, that is, the consideration does not move from Y.² But if this conveyance were by *deed*, as it would have to be under the Virginia statute of Conveyances,³ it would at least be sustained as an executory shifting limitation under the

4. Ante, §§ 1209, 1217, 1223.

5. Va. Code, 1904, §§ 2417, 2418; 2 Min. Insts. 780, 827.

6. Clinch River Veneer Co. v. Kurth, 90 Va. 737, 19 S. E. 878.

1. Ante, §§ 533, 542, 828, et seq.

2. 2 Min. Insts. 780.

3. Va. Code, 1904, § 2413.

statute of Future Grants, since, if made by *will*, it would have been good as an *executory devise*.⁴

(2) A enfeoffs T in fee, with livery of seisin, to the use of C in fee, but if C marry Z, then to go to the use of Y in fee. (Conveyance under the statute of Uses, operating *with actual transmutation* of the possession to T).

In England, this would be good as to both limitations, the latter taking effect in Y by way of a *shifting use* which the English statute of Uses converts into the *legal estate*.⁵ In Virginia, however, under our statute of Uses (which operates only where there is *no actual* transmutation of the possession), this conveyance would not create *legal estates* in C and Y, respectively, but would pass the *use* or *equitable title*, Y's estate being sustained in equity as a shifting use.⁶

(3) A bargains for value to stand seised to the use of C in fee, but if C marry Z, then to the use of Y in fee.

This would be effectual, both in England and in Virginia, as a bargain and sale under the statute of Uses, so far as C is concerned, but perhaps might not be sustained under that statute as to Y, as not being within the consideration. But in Virginia, the conveyance being *by deed*, it would in any event be sustained as to Y under the *statute of Future Grants*.⁷

(4) A covenants, in consideration of natural love, etc., for his son C, to stand seised to the use of C in fee, but if C marry Z, then to the use of his neighbor, Y, in fee.

The limitation to C would be good, both under the English and the Virginia statute of Uses, as a covenant to stand seised; but the limitation to Y would not be good under those statutes, because Y is not within the consideration, being no relative of the covenantor. But the conveyance being *by deed*, the limitations to both C and Y would take effect in Virginia under the statute of *Future Grants*.⁸

4. Va. Code, 1904, § 2418; 2 Min. Insts. 780; ante, § 828.

5. Ante, § 451.

6. Ante, § 455; 2 Min. Insts. 780; Va. Code, 1904, § 2426.

7. Va. Code, 1904, § 2418; 2 Min. Insts. 780.

8. Va. Code, 1904, § 2418; 2 Min. Insts. 780, 781.

(5) A *enfeoffs* T, with livery of seisin, or *devises*, or by deed *grants*, land to T, to hold *to such uses* as W shall *appoint by deed or will*.

At common law, the appointment by W of certain persons by his deed or will to take the use of such land *would operate nothing*, and T would have (originally) taken the whole estate. But upon the introduction of uses, the courts of equity permitted the creation of a use to commence *in futuro* in this way, and W's appointees would accordingly take the use, which the statutes of Uses or of Future Grants at a later period and at present would convert into a *legal estate*.

These are known as estates arising "under the exercise of a power of appointment," the existence of which was unknown to the common law, and are made possible,—at least, as to the *legal title*,—only by the operation of the statutes mentioned.

A separate chapter will hereafter be devoted to title arising under the exercise of a power of appointment.⁹

9. Post, § 1317, et seq.

CHAPTER XLIV.

TITLE BY DEVISE.

- § 1238. Outline of Discussion.
- 1239. Nature of Wills of Land, or Devises.
- 1240. Origin of Devises.
- 1241. Capacity to Devise Land, or Testamentary Capacity.
- 1242. I. Unsoundness of Mind.
 - 1. In General.
- 1243. 2. Lunacy and Monomania.
- 1244. II. Infancy of Testator.
- 1245. III. Effect of Fraud, Force or Undue Influence Exercised upon Testator.
- 1246. Capacity to Take under a Devise.
- 1247. Same—Devise Void Where It Is to Testator's Heir, to Take in Like Manner as He Would Take as Heir.
- 1248. Disclaimer of Title by Devisee.
- 1249. What Property Is Devisable.
- 1250. Formalities Required in the Execution of a Devise.
- 1251. The Will Must Be in Writing.
- 1252. The Signature of the Testator.
- 1253. Holograph Will.
- 1254. Attestation of Will by Subscribing Witnesses.
- 1255. The Competency of the Attesting Witnesses.
- 1256. A Devisee or Legatee (or His or Her Consort) as an Attesting Witness to a Will.
- 1257. Creditor of Testator (or His or Her Consort) as an Attesting Witness.
- 1258. Executor as Attesting Witness.
- 1259. Time at which Attesting Witness Must Be Competent.
- 1260. Signature by Testator or His Acknowledgment of the Will in Presence of Attesting Witness.
- 1261. Witnesses Must Be Present at Same Time.
- 1262. Witnesses to Subscribe Will in Testator's Presence.
- 1263. What Is "In the Presence of the Testator."
- 1264. The Revocation of Wills—In General.
 - 1265. I. Express Revocation of Wills.
 - 1266. Express Revocation Dependent upon Intention.
 - 1267. 1. Express Revocation by Subsequent Will or Codicil Executed Like a Will.

(1358)

- 1268. 2. Express Revocation by Declaration to That Effect in Writing Executed Like a Will.
- 1269. 3. Express Revocation by Cutting, Tearing, Burning, Canceling or Destroying the Will, with Intent to Revoke the Same (*Animo Revocandi*).
- 1270. II. Implied Revocation of Wills.
 - 1. Implied from a Subsequent Change of Estate.
- 1271. 2. Revocation Implied from Testator's Subsequent Marriage.
- 1272. 3. Revocation Implied from Subsequent Birth of Pretermitted Children.
- 1273. A. Where There Are No Children at Date of Will.
- 1274. B. Where There Are Children at Date of Will, and Others Are Subsequently Born.
- 1275. Republication or Revival of Revoked Wills.
- 1276. Effect of Revocation of Revoking Will.
- 1277. Effect of Republication of Will.
- 1278. Lapsed Devises—At Common Law.
- 1279. Doctrine in Virginia Touching Lapsed Devises.
- 1280. Effect of Lapse upon Residuary Clause.
- 1281. Probate and Recordation of Wills.
- 1282. Same—Effect of Condition That Devisee Shall Not Contest Will.

§ 1238. Outline of Discussion.

The devise is one of the most important and frequently recurring sources of title to real property, and must be examined with care. We shall consider the subject under the following heads: (1) The nature and origin of wills of lands; (2) Testamentary capacity; (3) The effect of undue influence; (4) Capacity of devisees; (5) Disclaimer of title by devisee; (6) What property is devisable; (7) The formalities required in the execution of wills; (8) The revocation of wills; (9) The republication of wills; (10) Lapsed devises; (11) The probate and recordation of wills.

§ 1239. The Nature of Wills of Land or Devises.

The word "devise" (from Fr. *deviser*—to speak) means a gift by will of *real property*, whilst the words "legacy" and "be-

(1359)

quest" both signify a gift by will of *chattels*. Hence, "devisee" means one to whom real property is *devised*, and legatee" one to whom personal property is *bequeathed*.¹

A will is a declaration, made in due form of law, of a man's mind of *last* will of what he would have to be done with his estate, whether real or personal, after his death. The word *testament* is synonymous with it, the two words being indiscriminately used in our law.²

A will or testament is always in its nature *ambulatory*, that is, revocable during the lifetime of the maker; and if truly a *will* and not partaking of the nature of a *contract*, it cannot be made irrevocable by the most express declaration.³

§ 1240. Origin of Devises.

Prior to the Norman Conquest, the better opinion seems to be that lands were freely devisable amongst the Anglo-Saxon and Danish people of England, though it would appear to have been rather adopted from the remnant of the Roman laws and customs which they found there, than brought from their own country; for Tacitus, writing of the ancient Germans, says, *successores sui cuique liberi at nullum testamentum*.¹

After the Conquest (A. D. 1066), and the introduction of the system of feuds, the power of devising lands ceased, except by the *custom* of particular places; and except also as to *terms for years* in lands, which, on account of their original imbecility and insignificance, were regarded as *personalty*, and as such were always, like other chattels, disposable by will. This limitation

1. 2 Min. Insts. 997; 2 Th. Co. Lit. 636, 646.

2. 2 Min. Insts. 997; Bac. Abr. Wills, (A); Coffman v. Coffman, 85 Va. 459, 17 Am. St. Rep. 69, 2 L. R. A. 848. In Virginia, it is enacted that "Except where it would be inconsistent with the manifest intent of the legislature, the word "will" shall extend to a testament, and to a codicil, and to an *appointment* by will or *by writing in the nature of a will*, in the exercise of a power; and also to any other testamentary disposition." Va. Code, 1904, § 2511.

3. 2 Min. Insts. 997; 2 Th. Co. Lit. 646; 4 Kent, Com. 520; Vynior's Case, 8 Co. 82a.

1. Germ. XX; 2 Min. Insts. 997.

of the testamentary power, as to freehold estates, proceeded partly from the solemn form of transferring land by livery of seisin introduced at the Conquest, which could not be complied with in case of a last will, partly from a jealousy of death-bed dispositions, but principally from the general restraint of alienation incident to the rigors of the feudal system, as it was established, or at least perfected, by the first William, about twenty years after his succession (say about A. D. 1086).²

In the reign of Edward I, the statute of *Quia Emptores* (18 Edw. I, c. 1, A. D. 1290), removed in great measure this latter bar to the exercise of testamentary power; that is, as to all *freeholders*, except the king's tenants *in capite*, as to whom it was also removed by statute, 1 Edward III, c. 12 (A. D. 1327). But the two former obstructions still continued to operate, and parliament was not moved, either by its own wisdom or the demands of the people of England, to relax or remove the common law restriction in respect to alienating lands by will, until 32 Henry VIII (A. D. 1541). That the English people, jealous as they are, and have ever been, of their rights of property, should have acquiesced so long in their deprivation of the right to dispose of their lands by will, is a remarkable phenomenon, which is only partially explained by the introduction of *uses*. It will be remembered, that *uses* came into fashion in the latter part of the reign of Edward III (say about A. D. 1370), and that ere the lapse of many years, declarations of the *use by will*, were readily protected and enforced in equity as declarations made by any other sort of instrument were; and we saw that *uses* were not a little recommended to public favor by the fact that they were thus devisable;³ and that through that medium the power of devising lands was thus exercised in effect and reality.

But when, in 1536, the famous statute, 27 Henry VIII, c. 10, was enacted, which was designed to abolish *uses* altogether, by

2. 2 Min. Insts. 998; 2 Bl. Com. 374; 2 Th. Co. Lit. 636, n. (2); ante, § 357.

3. Ante, § 448; 2 Min. Insts. 998, 205.

transferring the possession or legal estate to the use, and was at first supposed to have accomplished its intended purpose, although in the sequel it proved far otherwise, and *uses* were as easily created as before; when that statute was enacted, and the people found themselves (as was thought), deprived of the power of devising their lands through the medium of uses, they dealt so potentially with the parliament as, within the then wonderfully short period of five years, to obtain the statute since known as the *Statute of Wills and Devises*.⁴

But by neither of the first statutes of Wills was any form or ceremony prescribed, save that the will should be *in writing*; and very many frauds and perjuries having thence resulted, wholesome safeguards and detailed directions were devised and provided by the oft-cited statute of *Frauds and Perjuries*, 29 Car. II, c. 3, for wills, and also for certain other transactions, of which copious explanations have already been presented.⁵

From what has been said, it is apparent that in every country which derives its jurisprudence from England (as do all these states except Louisiana), the *right to aliene* freehold estates in lands at all, and the *mode of alienation*, must depend on *statute law*; and hence the extent of the right, and the mode of exercising it, may be expected to vary, more or less, in the several communities so situated; although, in respect to *wills* of lands especially, the statutes of the American states generally have been derived from a common English original, besides copying from one another, and are, therefore, in structure, and even in terms, closely assimilated.⁶

4. 2 Min. Insts. 998, 999; 32 Hen. VIII, c. 1, explained by 34 Hen. VIII, c. 5 (A. D. 1541, 1543); 2 Th. Co. Lit. 636, n. (2). These statutes permitted to be devised *all* the testator's *socage* and *two-thirds* of his *chivalry* lands; and 12 Car. II, c. 24 (A. D. 1660), having for the most part converted the chivalry tenures of England into socage tenures, pretty much all the lands in the kingdom became thereby devisable. 2 Min. Insts. 999.

5. 2 Min. Insts. 999.

6. 2 Min. Insts. 999.
(1362)

§ 1241. Capacity to Devise Land, or Testamentary Capacity.

The right to devise lands at all being statutory, the statute determines also the persons who shall be deemed competent by the law so to dispose of their real estate.

The Virginia statute permits to make a will of *lands* every person who is of *sound mind* and over the age of *twenty-one years*.¹

It will be observed that the disabilities to devise, or the testamentary incapacities, imposed by the statute are only two in number, namely, (1) Unsoundness of mind; and (2) Infancy; to which may be added upon general principles, (3) Fraud, force or undue influence exerted upon the testator.

§ 1242. I. Unsoundness of Mind—1. In General.

In the probate or establishment of a will, the executor or those who claim under it, hold the *affirmative* of the issue, and must therefore prove not only that the instrument is executed in due legal *form* as a will is required to be executed, but also that the testator was of *sound and disposing mind and memory*, and hence the propounder of the will for probate has in general the right to begin and conclude the argument.¹

It is exceedingly difficult to lay down any general rules of universal application, by which to determine whether a testator

1. Va. Code, 1904, §§ 2512, 2513. Formerly, the statute also recognized the disability of a *married woman* to devise her land, save as to her *separate estate*, or in the exercise of a *power of appointment*. Va. Code (1887), § 2513. But since *all* of a married woman's property is now her separate estate, either *equitable* or *statutory*, Va. Code, 1904, §§ 2286a, 2294; ante, § 309, et seq., this clause has been dropped from the statute.

1. *Burton v. Scott*, 3 Rand. (Va.) 399; *Riddell v. Johnson*, 26 Gratt. (Va.) 152; *Tucker v. Sandidge*, 85 Va. 556, 8 S. E. 650; *Gray v. Rumrill*, 101 Va. 507, 44 S. E. 697; *Potts v. House*, 6 Ga. 324, 50 Am. Dec. 331. But where a will is offered for probate, all the statutory formalities having been complied with, especially if the will is wholly in the handwriting of the testator and signed by him, there is a presumption of testamentary capacity and sanity. *Wallen v. Wallen*, 107 Va. 131, 57 S. E. 596.

is of such unsound mind as to deprive him of testamentary capacity.

Some of the older cases seem disposed to go very far in upholding the wills of persons of weak intellect, holding in effect that if there be a glimmer of reason, testamentary capacity is established.² But the more recent, and the better, view seems to be that each case should be judged according to the circumstances, and to call upon the propounder of the will to satisfy the *conscience* of the court that the testator, when he executed the will, was capable of knowing and understanding (1) the nature of the business he is then engaged in, (2) the elements of which the will is composed, and (3) the dispositions made therein of his property, both as to (a) the *estate* disposed of, (b) the *persons* to whom he means to give it, and (c) the *manner* in which it is to be distributed among them.³

Mere *eccentricity*, however great, does not suffice to invalidate a will.⁴ So, mere *old age* does not of itself deprive one of the

2. See *Stewart v. Lipscomb*, 26 Wend. (N. Y.) 255; *Potts v. House*, 6 Ga. 324, 50 Am. Dec. 346, 348, note; *Lee v. Lee*, 4 McCord (S. C.) 183, 17 Am. Dec. 722. In *Stewart v. Lipscomb*, *supra*, the court held a will valid, though executed by a woman who all her life was incapable of taking care of herself, and had to be watched, nursed and put to bed like a child. She could not be taught the Lord's Prayer, nor to read nor write. The utmost scope of her education was to spell words of two syllables. The court, in that case, laid down the following rules, which would scarcely at present be recognized,—at least, not in their entirety:—(1) That *weakness* of mind will not avoid a will, if it does not amount to idiocy, lunacy or total imbecility; (2) That in passing upon a will, courts do not attempt to *measure* the extent of the testator's understanding; for if he be not totally deprived of reason, whether he be wise or unwise, he is the lawful disposer of his property, and his will stands as a reason for his actions; (3) That a person's capacity may be perfect to dispose of property by *will*, and yet inadequate for the management of other business.

3. *Tucker v. Sandidge*, 85 Va. 555, 8 S. E. 650; *Porter v. Porter*, 89 Va. 118, 15 S. E. 500; *Chappell v. Trent*, 90 Va. 849, 19 S. E. 314; *Martin v. Thayer*, 37 W. Va. 38, 16 S. E. 489; 1 Redfield, Wills, 130

4. *Mercer v. Kelso*, 4 Gratt. (Va.) 106; *Lee v. Lee*, 4 McCord (S. C.) 183, 17 Am. Dec. 722; *Potts v. House*, 6 Ga. 324, 50 Am. Dec. (1364)

capacity to make a will. The want of recollection of names is one of the earliest symptoms of the decay of memory from old age; but it does not create a testamentary incapacity unless it be quite total, or extends to the immediate family and property of the testator.⁵

An *habitual drunkard* is competent to make a will, unless his constant intoxication has produced *settled derangement* of his mental faculties, or unless he was so intoxicated at the time of executing the will as to have lost temporarily the use of his reason and memory. The condition of *mental incapacity* is the point to be considered, and that may be produced by a single act of intoxication.⁶

346, note. Thus, in *Lee v. Lee*, *supra*, the testator supposed himself continually haunted by witches, devils and the like, which he fancied were always worrying him. He believed that all women are witches ("in which," says the learned court, "he was perhaps not so singular"). He lived in the strangest manner, wore an extraordinary dress, and slept in a hollow log. He imagined that the Wiggins (relatives whom he wished to disinherit) were in his teeth, and to dislodge them he had fourteen sound teeth extracted. He had the quarters of his shoes cut off, saying that if the devil got into his feet he could drive him out the easier. His clothes at his death were appraised at one dollar. He always shaved his head close, so that, as he said, in the contests with the witches, they might not seize hold of his hair, and also to make his wits glib. He fancied at one time he had the devil nailed up in a fireplace at one end of the house, and had a mark made across his room over which he never would pass, nor would he suffer it to be swept. He cut off the tails of all his hogs and cattle close to the roots, saying the cows made themselves poor fighting the flies with their tails, but cut them off and they would get as fat as squabs. And yet, notwithstanding these and many other hallucinations and whimsicalities, the will was established. See note to *Potts v. House*, *supra*.

5. 1 Redfield, Wills, 97, et seq.; *Van Alst v. Hunter*, 5 Johns. Ch. (N. Y.) 148; *Browne v. Malliston*, 3 Whart. (Penn.) 129. See *Spencer v. Moore*, 4 Call (Va.) 423; *Hartman v. Strickler*, 82 Va. 238; *Whitelaw v. Sims*, 90 Va. 588, 19 S. E. 113; *Montague v. Allen*, 78 Va. 592, 49 Am. Rep. 384.

6. *Temple v. Temple*, 1 Hen. & M. (Va.) 476; *Peck v. Cary*, 27 N. Y. 9, 84 Am. Dec. 220, note; *Gardner v. Gardner*, 22 Wend. (N. Y.) 526, 34 Am. Dec. 340; *McLaughlins' Will*, 2 Redf. (Vt.) 513.

(1365)

Formerly, *deaf and dumb* persons were *prima facie* supposed to be without intellect, since they do not possess the ordinary inlets of learning and knowledge. But this presumption was rebuttable by particular proof of intelligence, as where they could write or make their wishes readily known. In recent times, however, with the modern facilities for instructing such unfortunates and the widespread extent of such instruction, there is no reason to indulge any presumption at all against their intelligence, though the courts will jealously guard against any imposition practiced upon them.⁷

§ 1243. Same—2. Lunacy and Monomania.

Lunacy may be either total or partial, the one existing at all times and extending to all subjects, the other occurring only at particular times or extending only to particular hallucinations. In either case, when the hallucination *enters into and affects* the provisions of the will, it invalidates the instrument, which result would always occur if the insanity be *total*. But if the lunacy is *partial* only, and the will is made in a *lucid interval*, or the hallucinations of the testator do not relate to the matters or persons mentioned in the will, it is valid.¹

7. 1 Redfield, Wills, 52, et seq.

1. Potts v. House, 6 Ga. 324, 50 Am. Dec. 353, 354, note; Pidcock v. Potter, 68 Penn. St. 342, 8 Am. Rep. 181, 188, note; Dew v. Clark, 1 Hagg. Ecc. 311. The last case is a striking illustration of that delusion in relation to the act in question, which may defeat a will, while the testator may be sane on all other subjects. In that case, the testator was a sensible man, conducting himself rationally in his affairs and in the ordinary transactions of life. His friends never even suspected that he was deranged. Yet it was shown that he labored under some strange hallucinations both as to himself and his daughter. She was proved to have been always amiable in her disposition, of superior talents and engaging manners, diligent, patient, dutiful and religious; yet in the deluded mind of the father she was the most extraordinary instance of depravity, vice, crime, profligacy and disobedience, and quite irreclaimable; while he considered himself a pattern of fatherly tenderness and affection, though tying his daughter to a bed post and flogging her unmercifully, and compelling her (1366)

The fact that a testator has disinherited all his relatives, or has preferred collateral relatives to his next of kin, is only a circumstance *tending* to show mental incapacity, and standing alone is of no value for the purpose of showing the testator's incompetency, for a testator may do what he wills with his own, though he act unjustly to his relatives. But, taken with other circumstances, the fact of such disposition may be of considerable weight in establishing mental unsoundness or undue influence.²

The proof of the testator's insanity may be made either by the subscribing witnesses to the will, by expert medical evidence, or by the evidence of any person cognizant of the circumstances, disposition, daily life or actions of the testator. Such person is always at liberty to testify to the facts within his knowledge, and is sometimes permitted to give *his impression* of the testator's general mental condition. And in any event, the proof must be clear and convincing.³

§ 1244. •II. Infancy of Testator.

In Virginia, the statute fixes the age at which one, whether male or female, may make a valid will of lands at *twenty-one years*,¹—or, in other words, *no infant* can devise land.

to perform the most menial drudgery. These impressions were recorded in his will, but Sir John Nichols, taking a different view of both father and daughter from that of the testator, pronounced against the testator's competency and the validity of the will. See *Boyd v. Eby*, 8 Watts (Penn.) 71, 72.

2. *Peck v. Cary*, 27 N. Y. 9, 84 Am. Dec. 220, note; *Calhoun v. Jones*, 2 Redf. (Vt.) 38; *Addington v. Wilson*, 5 Ind. 137, 61 Am. Dec. 81, note; *Coffin v. Coffin*, 23 N. Y. 9, 80 Am. Dec. 235, note; *Nicholas v. Kirshner*, 20 W. Va. 251; *Couch v. Eastham*, 29 W. Va. 784, 3 S. E. 23; *Martin v. Thayer*, 37 W. Va. 38, 16 S. E. 489; *Kerr v. Lunsford*, 31 W. Va. 659, 2 L. R. A. 668, 8 S. E. 493.

3. 1 Redfield, Wills, 31, 32; *Gray v. Rumrill*, 101 Va. 507, 44 S. E. 697; *Tucker v. Sandidge*, 85 Va. 546, 8 S. E. 650; *Chappell v. Trent*, 90 Va. 849, 19 S. E. 314; *Whitelaw v. Sims*, 90 Va. 588, 19 S. E. 113; *Porter v. Porter*, 89 Va. 118, 15 S. E. 500; *Potts v. House*, 6 Ga. 324, 50 Am. Dec. 333, note; *Clary v. Clary*, 2 Ired. L. (N. C.) 78; *Morse v. Crawford*, 17 Vt. 499, 44 Am. Dec. 349, note.

1. Va. Code, 1904, § 2513. The same statute fixes *eighteen years* as the age at which persons may dispose of *personalty* by will.

(1367)

The only point that need demand our attention under this head is whether an infant testator has the same right as he would have in the case of a *contract* made by him to *confirm* the will when he comes of age, without republishing it or executing a new will.

The English authorities lay down the rule, seemingly without qualification, that the mere *ratification* of the will by the infant testator, after he becomes of legal age to execute it, renders it a valid instrument, without a republication or a re-execution thereof.² But while this may be true as to wills of *personalty*, the right to make which in general exists *at common law*, and is not dependent upon statute, it would seem that in the case of *devises*, of land, which can be made at all only by virtue of *statute*, the devise is *void* (not merely *voidable*) if the statute is not conformed to, and is therefore incapable of ratification otherwise than by *re-executing* the will after the testator reaches the age prescribed by the statute for that purpose.³

§ 1245. III. Effect of Fraud, Force or Undue Influence upon the Testator.

It is manifest that a will to be valid must express and represent the *real*, as well as the *last*, will of the testator. Hence, where physical constraint is employed, the will is invalid. But it is in like manner void wherever it appears that the testator's freedom of volition has been impaired in consequence of his imbecility, some deception practised upon him, his undue confidence, his overweening affection, or otherwise.¹

The principles controlling the doctrine of undue influence are necessarily vague, because of the extreme difficulty,—not to say impossibility,—of defining such influence. The cases also are numerous and various almost beyond parallel; and if one should

2. 1 Williams, Ex'ors, 16; Bac. Abr. Wills (B).

3. 1 Redfield, Wills, 19. See Va. Code, 1904, § 2519.

1. 2 Min. Insts. 1047; 3 Lom. Dig. 182, 183; 1 Jarman, Wills (5th Am. ed.) 35, n. 1; 1 Redfield, Wills, 508, et seq., 524, 535, 537; Greer v. Greer, 9 Gratt. (Va.) 330; Parramore v. Taylor, 11 Gratt. 220; Whitesel v. Whitesel, 23 Gratt. 906; Simmerman v. Songer, 29 Gratt. 24. (1368)

become familiar with them all, it would tend but little to disclose any salient principle which would resolve the next case.

It is believed that the doctrine may be fairly summarized in the propositions following, namely:

(1) Undue influence, in order to avoid a will, must annul the testator's freedom of purpose, and render the instrument the offspring of the will of *others*, rather than of *his own*;

(2) Honest intercession, argument and persuasion addressed to the testator's understanding, conscience or affection, not controlling his will in opposition to his *judgment or inclination*, and not coupled with *fraud or imposition*, will not amount to undue influence, though urged beyond the bounds of strict propriety;

(3) Influence gained by *kindness and affection* will not be regarded as undue, if *no imposition nor fraud* be practised, even though the testator be induced thereby to make an unequal or even an *unjust* distribution of his property;

(4) The influence, in order that it shall be undue, must be exerted specifically, upon the *very act of making a will* in favor of particular parties; and

(5) It must *mislead* him to the extent of making a will essentially *contrary to his duty*.

These propositions are sustained by a long array of authorities and decisions.²

§ 1246. Capacity to Take under a Devise.

In Virginia, the persons to whom lands may be devised are

2. 2 Min. Insts. 1040, 1048; *Hoover v. Neff*, 107 Va. 441, 59 S. E. 428; *Wallen v. Wallen*, 107 Va. 131, 57 S. E. 596; *Jenkins v. Rhodes*, 106 Va. 564, 56 S. E. 722; 1 Redfield, Wills, 524, et seq.; *Young v. Barner*, 27 Gratt. (Va.) 103, et seq.; *Simmerman v. Songer*, 29 Gratt. 24; *Montague v. Allen*, 78 Va. 592, 49 Am. Rep. 384; *Hartman v. Strickler*, 82 Va. 234; *Chappell v. Trent*, 90 Va. 849, 19 S. E. 314; *Small v. Small*, 4 Greenl. (Me.) 220, 16 Am. Dec. 257, et seq., note. See, also, *Clark v. Fisher*, 1 Paige (N. Y.) 171, 19 Am. Dec. 402, note; *Gardner v. Gardner*, 22 Wend. (N. Y.) 526, 34 Am. Dec. 340, 354, note; *Davis v. Calvert*, 5 Gill & J. (Md.) 269, 25 Am. Dec. 282; *Flood v. Flood*, 3 Strobb. (S. C.) 44, 49 Am. Dec. 629; *Woodward v. James*, 3 Strobb. 552, 51 Am. Dec. 49; *Potts v. House*, 6 Ga. 324, 50 Am. Dec. 355.

not ascertained by any precise statutory provision, but must be gathered from the general tenor of the law, from which it appears that lands may be devised to *all persons*, (except alien enemies), who are *definitely ascertained*, and provided the *purposes and objects* of the devise are definite. If these are indefinite and uncertain, the devise is void.¹

Thus, a devise to "the Roman Catholic congregation at R.," the congregation being *unincorporated*, is void for the uncertainty of the *devisees*;² and so is a devise to the (unincorporated) "Baptist Association that for common meets at P."³

On the other hand, a devise "for the benefit of the trade of the town of A" is void for the uncertainty of the *purposes or objects* of the devise.⁴ And so, independently of statute, was held to be a devise for the erection and endowment of a seminary of learning.⁵ But in Virginia by statute (suggested by the case of *Literary Fund v. Dawson*, just referred to) it is provided that gifts and devises for *literary or educational purposes* within this state (other than for the use of an *unincorporated theological seminary*), shall be valid, whether made to a body corporate or unincorporated, or to a natural person (with some cautious reservations).⁶

1. Va. Code, 1904, § 43; 2 Min. Insts. 1001, 1045, et seq.; 1 Jarman, Wills, 356, et seq.; 370, et seq.; 376, et seq.; 383, et seq. See 7 Va. Law Reg. 620.

2. *Galleo v. Atto. Gen.*, 3 Leigh (Va.) 450, 24 Am. Dec. 650.

3. *Baptist Association v. Hart*, 4 Wheat. 372. See, also, *Brocke v. Shacklett*, 13 Gratt. (Va.) 309; *Seaburn v. Seaburn*, 15 Gratt. 425; *Roy v. Rowzie*, 25 Gratt. 607, et seq.

4. *Wheeler v. Smith*, 9 How. 55. See *Gibson v. Gibson*, 28 Gratt. (Va.) 44, 48.

5. *Literary Fund v. Dawson*, 10 Leigh (Va.) 148.

6. Va. Code, 1904, § 1420, et seq.; 2 Min. Insts. 1046; *Kelley v. Love*, 20 Gratt. (Va.) 129, et seq.; *Com. v. Levy*, 23 Gratt. 40; *Kinnaird v. Miller*, 25 Gratt. 115, et seq.; *Roy v. Rowzie*, 25 Gratt. 599. It must be remembered, however, that in respect to trusts for the use or benefit of *religious congregations* and benevolent associations, a material change has occurred in the policy of Virginia, confined however to *deeds*, and not extending to wills. See Va. Code, 1904, (1370)

In England, very much more indulgence is manifested to *indefinite charities* than to other indefinite gifts and devises; and this diversity was long attributed, not to the common law, of which some thought the statute 43 Eliz., c. 4, merely declaratory, but to the terms of that statute, which most supposed to have introduced a new doctrine. It was under this latter view of the law that the earlier Virginia cases were adjudicated.⁷

But upon an investigation of the ancient records of the court of chancery in the Tower of London, in 1831 and afterwards, it was discovered that in very many cases prior to the statute 43 Eliz., c. 4, a similar discrimination in favor of charities had prevailed in equity, and that 43 Eliz. was little more than affirmatory of the common law.⁸

Virginia, however, notwithstanding this development of the mistake upon which her earlier cases had proceeded, has not thought fit to recede from the doctrine those cases had established; still holding that vague and indefinite charities, like other indefinite dispositions of property, are in general void.⁹

In Pennsylvania, where no previous doctrine had been recognized, the Supreme Court of the United States, in the great Girard will case, conceived itself bound to adopt, as the doctrine of the common law, the discrimination in favor of vague and indefinite charities, brought to light through the medium of the ancient records referred to above; and accordingly, that court held Girard's munificent provision for the creation and endowment of a great seminary of learning, to be called by his own

§ 1398, et seq.; *Seaburn v. Seaburn*, 15 Gratt. (Va.) 426, et seq., 432; ante, § 522; 2 Min. Insts. 253.

7. 2 Min. Insts. 1046; *Gallego v. Atto. Gen.*, 3 Leigh (Va.) 450, 24 Am. Dec. 650; *Baptist Association v. Hart*, 4 Wheat. 472.

8. 2 Min. Insts. 1046.

9. Ante, § 522; 2 Min. Insts. 253, 1046; *Wheeler v. Smith*, 9 How. 80; *Brooke v. Shacklett*, 13 Gratt. (Va.) 309, et seq.; *Seaburn v. Seaburn*, 15 Gratt. 426; *Roy v. Rowzie*, 25 Gratt. 607, et seq.; *Fifield v. Van Wyck*, 94 Va. 567, et seq., 64 Am. St. Rep. 745, 27 S. E. 446. But see *Protestant Epis. Educational Soc. v. Churchman*, 80 Va. 718, 755; *Trustees v. Guthrie*, 86 Va. 125, 6 L. R. A. 321, 10 S. E. 318.

(1371)

name, to be valid, and directed his scheme to be carried out in conformity to his will.¹⁰

It must be observed, that the question in all cases is not whether the *trustee* be ascertained, but whether the beneficiary, or beneficial object, be certain; for it is an established maxim of a court of equity never to suffer *a trust to fail for want of a trustee*, so that if the trustee is not designated with sufficient certainty, supposing the person or object designed to be benefited is sufficiently described, equity will supply a trustee.¹¹

§ 1247. Same—Devise Void, Where It Is to Testator's Heir, to Take in Like Manner as He Would Take as Heir.

The law forbids a testator to devise lands to his *heir*, to take them *in like manner* as he would take them *as heir*, in order to prevent title by descent from being confounded with title by *purchase*. Such confusion, in feudal times, would have affected the tenure of lands, and at a later period would have impaired the interests of creditors, certain of whom could charge with their debts lands *descended*, but not lands *devised*, except in pursuance of a comparatively modern statute (3 & 4 Wm. & M., c. 14), known as the statute of Fraudulent Devises.¹

The test by which we may determine the applicability of the doctrine to any particular case is to *strike out* the devise to the heir, and if he would still take the same interest as the will gives him, the *devise is void*. Hence, in order that the doctrine may apply, the devisee must be the *sole heir* to the lands devised; for if he is only one of several coheirs, although the very same share be given him as he would take by descent, he does not take it in the same way; for, as coheir, he would take it *in coparcenary* with his fellows; whereas, as devisee, he would take it *in severalty*, if it was devised to him alone, and, if devised to

10. *Vidal v. Girard*, 2 How. 196; 2 Min. Insts. 1047; 3 Lom. Dig. 16, 181, 189, et seq.

11. 2 Min. Insts. 1047; 2 Story, Eq. Jur., §§ 976, 1059, et seq.; *Charles v. Hunnicutt*, 5 Call (Va.) 312.

1. 2 Min. Insts. 1045.

him along with others, he would take as *joint tenant*, or *tenant in common*.²

§ 1248. Disclaimer of Title by Devisee.

The devise, by force of the statute of Wills, immediately upon the testator's death, *vests the title in the devisee*, irrespective of his consent. If, therefore, he does not choose to accept the testator's bounty, he must, by the appropriate means, *divest* himself of the estate already vested in him. By the statute of Conveyances, the appropriate means, if the estate devised be a freehold, an inheritance, or a term exceeding five years, is by *deed*.¹

§ 1249. What Property Is Devisable.

Any estate, right or interest is, under the Virginia statute, devisable to which the testator may be entitled at his *death*, notwithstanding he may become so entitled subsequently to the execution of the will, a will being declared by statute, with reference to the *real* as well as the *personal* estate comprised in it, to *speak and take effect* as if it had been executed immediately before the testator's *death*, unless a contrary intention shall appear by the will.¹

A will of *personalty* was always understood at common law thus to speak as of the death of the testator; and it is surprising, when wills of *lands* were introduced, that the obvious analogy

2. 2 Min. Insts. 1045; 3 Lom. Dig. 178, et seq.; 2 Th. Co. Lit. 646, n. (B); Biedler v. Biedler, 87 Va. 300, 12 S. E. 753. This doctrine was sought to be applied in Biedler v. Biedler, *supra*. In that case, after giving some land to his two sons, the testator devised all the residue of his estate "to go as the law directs." It was argued that the devise was to the testator's children, to take as they would take *as heirs*, and that, since the first gift constituted an *advancement*, the doctrine of *hotchpot* applied. But the court held that, even supposing this doctrine to be now of practical importance, the rule never applied to the case where there were *several devisees*, but only where there was a *single devisee* who was also the *sole heir*.

1. Va. Code, 1904, § 2413; 2 Min. Insts. 1044; 3 Lom. Dig. 193; Bryan v. Hyre, 1 Rob. (Va.) 94, 105, 39 Am. Dec. 246; Suttle v. R. R. Co., 76 Va. 284.

1. Va. Code, 1904, §§ 2512, 2521; 2 Min. Insts. 1001.

(1373)

did not lead to a like construction as to them. But adhering rigorously to the letter of the statute of Wills, which allowed any person "*having manors*," etc., or "*having a sole estate*," etc., to devise them, the English judges held that the deviser must *have the estate* at the time of making his will; for, said they, he cannot devise what *he has not in him* at the time of devising.²

The provision of the Virginia statute above cited (which is taken from 7 Wm. IV and 1 Vict., c. 26) although after-acquired lands had previously been permitted to pass by our laws, *if contemplated*,³ puts wills of lands and of chattels on the same footing in this particular, and makes both speak as at the testator's death. It will be observed, however, that the language of the will is not to be distorted or perverted. It can only be applied to such property as it is fairly applicable to at the death of the testator. If the will says, "I give all my lands to A," it will embrace any lands that the testator may own at his death, whether he owned them at the date of the will or bought them afterwards. But if it says, "I give *Black-acre* to A," and afterwards the testator sells *Black-acre* and buys *White-acre*, of which he dies seised, *White-acre* does not pass, because the words of the will are not applicable to it.⁴

It may be observed that, independently of statute, when a testator, having both *freehold and leasehold* lands in a particular district, devises "*all his lands*" in that district, only the *freehold* lands pass, though if he had *no freehold lands* there, the leaseholds would pass under such description.⁵

In Virginia, however, this doctrine has been qualified by statute (taken from 7 Wm. IV and 1 Vict., c. 26), providing that "a devise of the *land of the testator*, or of the land of the testator in any place, or in the occupation of any person mentioned in his will, or otherwise described in a general manner, or any

2. 2 Min. Insts. 1001; 3 Lom. Dig. 29; Butler & Baker's Case, 3 Co. 30b; Harwood v. Goodright, Cowp. 90.

3. Harrison v. Allen, 3 Call (Va.) 289; 2 Min. Insts. 1001.

4. 2 Min. Insts. 1001, 1002; Williams, Real Prop. 192, 249, 332.

5. 2 Min. Insts. 1063; Rose v. Bartlett, Cro. (Car.) 292; Minnis v. Aylett, 1 Wash. (Va.) 302. (1374)

other general devise which would describe a *leasehold* estate if the testator had no freehold estate which could be described by it, shall be construed to include the *leasehold* estates, or any of them to which such description shall extend, as well as *freehold* estates, unless a contrary intention shall appear by the will.”⁶

§ 1250. Formalities Required in the Execution of a Devise.

In this respect, as in other matters relating to wills of lands, the statute must be closely followed, or else the will is void.

The requirements under the Virginia statute are as follows:

“No will shall be valid unless it be *in writing* and *signed*, by the testator or by some other person in his presence and by his direction, in such manner as to make it manifest that the name is *intended as a signature*; and moreover, unless it be *wholly written by the testator* [in which case it is designated a *holograph will*], the *signature* shall be made or the *will acknowledged* by him *in the presence* of at least *two competent witnesses*, present *at the same time*; and such witnesses shall *subscribe* the will in the *presence of the testator*, but *no form* of attestation shall be necessary.”¹

With respect to wills made in the exercise of a *power of appointment*,² it is further provided by statute in Virginia that “No appointment made *by will*, in the exercise of a power, shall be valid unless the same be so executed that it would be valid for the disposition of the property to which the power applies, if it *belonged* to the testator; and every will so executed, except the will of a *married woman*, shall be a *valid execution* of a power of appointment *by will*, notwithstanding the instrument creating the power expressly require that a will made in execution of such power shall be executed with some *additional* or

6. Va. Code, 1904, § 2525; 2 Min. Insts. 1063, 1064.

1. Va. Code, 1904, § 2514, which is almost identical with the English statutes of Wills, 29 Car. II, c. 3, § 5; 7 Wm. IV and 1 Vict., c. 26; 15 & 16 Vict., c. 24. See 2 Min. Insts. 1011.

2. Post, § 1325, et seq.

other form of execution or solemnity."³

A married woman, then, it would seem, must *in all cases* execute a power of appointment *by will*, as a will is required to be executed; and if other or additional forms or solemnities be required by the power, they also must be observed.⁴

In the analysis of the very important statute first above quoted, it will be necessary to consider the following heads: (1) The will must be in writing; (2) The signature of the testator; (3) The holograph will; (4) The attestation by the subscribing witnesses; (5) The competency of the witnesses; (6) The presence of the witnesses at the same time; (7) The subscription by the witnesses in the testator's presence.

§ 1251. Same—The Will Must Be in Writing.

It is not material upon what matter or stuff it be written, whether paper or parchment, linen, leather, stone, or metal, or in what tongue, or whether in print or manuscript, with ink or in pencil, or in what kind of handwriting, or character, so it is legible, and the meaning be capable of being deciphered. Neither is it material whether it be expressed at large, or by mere notes, usual or unusual; or whether sums of money, etc., be written in words or in figures; provided the meaning be free from ambiguity and doubt.¹

A will, however, if in writing, need not be confined to one paper, but may consist of several testamentary papers of different dates, even though the first be attested by witnesses and the succeeding one holograph, and the expression in the paper subsequently executed, "This is my last will" is not entitled to any weight, in the absence of a clause revoking former wills. In such cases, if the subsequent paper is merely *supplemental*, it

3. Va. Code, 1904, § 2515.

4. 2 Min. Insts. 1019. See *Thorndike v. Reynolds*, 22 Gratt. (Va.) 21.

1. 2 Min. Insts. 1011; Bac. Abr. Wills (D), 1; 3 Lom. Dig. 36, 37; *Masters v. Masters*, 1 P. Wms. 425, 426; *Dickenson v. Dickenson*, 2 Phill. (2 Eng. Eccl.) 173. Will written on a slate admitted to probate, see 7 Va. Law Reg. 63.

(1376)

will be treated as a codicil; if partially conflicting, that of later date will operate to *revoke* the former *only so far* as the provisions of the two are *conflicting or incompatible*, the court adopting that construction which will give effect to *all* the testamentary papers, if possible, sacrificing the earlier papers only to the extent that they are clearly irreconcilable with the later.²

It is to be observed that the *whole will* must be in writing as the statute directs, and hence a gift (absolute on the face of the will) to one named as devisee is none the less absolute because accompanied by *verbal* instructions creating a trust in the devisee for the benefit of another. Any unwritten part of a will is void and inoperative, in the absence of fraud.³ But if it appears upon the face of the will that the property is given to the devisee by way of trust for another, while verbal instructions as to the beneficiary cannot be given effect, the beneficiary may sometimes be inferred from that portion of the will which is in writing; if not, then he holds it for the benefit of the testator's heirs or residuary devisee.⁴

But an exception to this rule is allowed in equity where the devisee has procured an *absolute* devise to himself by *promising the testator* that he would hold it for the benefit of another, and afterwards refuses to perform his promise, claiming the property in his own right under the will and for his own benefit. This exception is allowed upon the ground of the trust resulting from the confidence reposed in him by the testator, and because not to do so would be to permit the devisee to profit by his own fraud, and to convert the statute of Wills into a law for the consummation of fraud, instead of for its prevention.⁵

2. *Gordon v. Whitlock*, 92 Va. 723, 24 S. E. 342.

3. *Sims v. Sims*, 94 Va. 583, 64 Am. St. Rep. 772, 27 S. E. 436; *Sprinkle v. Hayworth*, 26 Gratt. (Va.) 392.

4. *Sims v. Sims*, 94 Va. 580, 64 Am. St. Rep. 772, 27 S. E. 436; *Olliffe v. Wells*, 130 Mass. 221.

5. *Pomeroy*, Eq. Jur., §§ 430, 919, 1054; *Sims v. Sims*, 94 Va. 583, 64 Am. St. Rep. 772, 27 S. E. 436; *Sprinkle v. Hayworth*, 26 Gratt. (Va.) 392; *Towles v. Burton*, Rich. Eq. Cas. (S. C.) 146, 24 Am. Dec. 409, note; *Hoge v. Hoge*, 1 Watts (Penn.) 163, 26 Am. Dec. 52, note.

It may be further observed in this connection that a written paper may be good as a will, though not in testamentary form or without the testator's knowledge that he has made a will. Thus, writings in the form of deeds, letters, bonds, notes, etc., have been held to be effectual as wills; where they were not intended to take effect until *after the maker's death*, and actually represent the expression of the party's last will, supposing always that the requirements of the statute of Wills have been complied with.⁶

Nor does it prevent the writing from operating as a will that the maker designed it to be provisional only, intending to make a more formal or a different disposition of his property, if in fact the intention was not fulfilled, and the writing was never revoked in any of the modes required by law. It is necessary, however, that the writing, whatever it be, should have been designed by him as an *actual disposition* of property, to take effect after his death, not as a mere expression of what he intended or expected to do.⁷

The fact that the testator explains in his will the reason why he makes it at that time, though put in the ordinary form of a condition, does not make such statements of reasons the event or condition upon which the will is to take effect. The will is valid, though the fears of the testator as to approaching death be not realized, if the will remains unrevoked till his death. Thus a letter or other writing beginning "In case of my death upon this trip," etc., and disposing of his property is a will which will be effectual even though the testator survive the trip.⁸

6. 2 Min. Insts. 1037; *McBride v. McBride*, 26 Gratt. (Va.) 480, et seq.; *Cody v. Conly*, 27 Gratt. 319. See *Gibson v. Gibson*, 28 Gratt. 44.

7. 2 Min. Insts. 1037, 1038; 1 Lom. Ex. 33; *Sharp v. Sharp*, 2 Leigh (Va.) 262; *Waller v. Waller*, 1 Gratt. (Va.) 454, 478, et seq., 42 Am. Dec. 571; *Hocker v. Hocker*, 4 Gratt. 277; *McBride v. McBride*, 26 Gratt. 480, et seq.; *Cody v. Conly*, 27 Gratt. 319, et seq. See *Gibson v. Gibson*, 28 Gratt. 44; *Coffman v. Coffman*, 85 Va. 459, 17 Am. St. Rep. 69, 2 L. R. A. 848.

8. *Skipwith v. Cabell*, 19 Gratt. (Va.) 758; *Cody v. Conly*, 27 Gratt. 313; *French v. French*, 14 W. Va. 458.
(1378)

§ 1252. Same—The Signature of the Testator.

The English statute, 29 Car. II, c. 3, § 5, did not prescribe where the signature should be placed, and soon after the enactment of the statute, it was determined in the great case of *Lemayne v. Stanley*,¹ that it was immaterial, if the name were written *by the testator himself*, or by his direction and in his presence, where it appeared, whether at the *top or bottom*, or *in the margin*. This decision (made 33 Car. II, A. D. 1682), was often regretted, but never directly overruled until it was done by statute both in England and in Virginia. It was agreed that the object in requiring the testator's signature was twofold, namely: (1) To *connect him* with the paper; and (2) To afford proof of the *finality*, or *completion* of the testamentary intent. It was admitted, also, that the *first* object was satisfactorily attained by the testator's signature occurring *anywhere* in the paper. But it was insisted that the *second* object was wholly frustrated by allowing the signature to be anywhere else but at the *end*; and in response to the suggestion that the *finality* of testamentary intent was proved by the attestation of the *subscribing witnesses*, it was said that the statute designed *two safeguards*, the attestation of the witnesses, and the *signature also*, and that the courts thwarted the design of the legislature when they dispensed with either.²

The Virginia courts, like those of England, acquiesced reluctantly in *Lemayne v. Stanley*, until November, 1818, when, in the case of *Selden v. Coalter*,³ it was *very gravely doubted* whether the doctrine of that case was applicable to a will *wholly written* by the testator's own hand, which by the Virginia statute does not need to be attested by subscribing witnesses at all; for that there would then be no proof whatever on the face of the will, of the *finality of the testamentary intent*; and afterwards, in 1845, in *Waller v. Waller*,⁴ that doubt as to *holograph*

1. 3 Lev. 1; 2 Min. Insts. 1011.

2. 2 Min. Insts. 1011, 1012; 2 Bl. Com. 376, 377, n. (9).

3. 2 Va. Cas. 553; 2 Min. Insts. 1012.

4. 1 Gratt. (Va.) 454, 42 Am. Dec. 571; 2 Min. Insts. 1012.

wills was not a little strengthened, although the court still admitted that in an *attested will* it must follow *Lemayne v. Stanley*.

Then, in 1850, came the statute (taken from 7 Wm. IV and 1 Vict., c. 26; see, also, 15 and 16 Vict., c. 24), requiring that the signature should be affixed in such a manner as to make it *manifest* that the name was *intended as a signature*.⁵

It is to be observed that a *seal* is not requisite for a will; and although some of the earlier cases leaned to the conclusion that sealing without signing would suffice,⁶ that view is now wholly overruled.⁷

On the other hand, making a cross mark (accompanied by the testator's name, though written by some one else) is a sufficient signing.⁸ And in Virginia, it will be remembered, the statute expressly provides that the will may be signed by some one other than the testator, if signed in his presence and by his direction.⁹

§ 1253. Same—Holograph Will.

The Virginia statute dispenses with the necessity for attesting witnesses altogether, if the will is *wholly written by the testator*,¹ in which case it is termed a "*holograph*" will. Whether this provision requires that the will be in the testator's own handwriting,

5. Va. Code, 1904, § 2514; 2 Min. Insts. 1012. See *Ramsey v. Ramsey*, 13 Gratt. (Va.) 664, 70 Am. Dec. 438; *Roy v. Roy*, 16 Gratt. 418, 84 Am. Dec. 696; *Warwick v. Warwick*, 86 Va. 596, 6 L. R. A. 775, 10 S. E. 843.

6. *Lemayne v. Stanley*, 3 Lev. 1; *Warneford v. Warneford*, 2 Str. 764; 2 Min. Insts. 1012.

7. 2 Min. Insts. 1012; 2 Bl. Com. 376, n. (9); 3 Lom. Dig. 37, 38; *Smith v. Evans*, 1 Wills 313; *Grayson v. Atkinson*, 2 Ves. Sr. 454, 459; *Wright v. Wakeford*, 17 Ves. 458, 459.

8. 2 Min. Insts. 1013; *Baker v. Denning*, 8 Ad. & El., 94; *Harrison v. Harrison*, 8 Ves. 185, n. (a); *Addy v. Grix*, 8 Ves. 504.

9. Va. Code, 1904, § 2514. See *Chappell v. Trent*, 90 Va. 850, 19 S. E. 314. See post, §§ 1262, 1263, as to what is meant by "in the presence of the testator."

1. Va. Code, 1904, § 2514. See *Lagrove v. Merle*, 5 La. Ann. 278, 52 Am. Dec. 589, 591, note; *Estate of Fay*, 145 Cal. 82, 104 Am. St. Rep. 22, note.

(1380)

or whether it is sufficient if he trace over the words written by another or if he write the will on a typewriter, has not yet been determined.

But if wholly written by the testator, being of sound mind, and signed by him, it is valid, notwithstanding there be appended to it an *attestation clause, unsigned by witnesses*; and another testamentary paper, bearing the same date, and found folded up with the will, and written and signed by the testator, is a valid codicil, although it does not refer to the will.²

Under the statute it is essential that a holograph will, like any other, be signed by the testator "in such a manner as to make it manifest that the name is intended as a signature;"³ and therefore, in the absence of any affirmative evidence on the face of the paper that it is intended as a signature, the testator's name appearing at the commencement or in the body of the will is not a sufficient signature.⁴ But where a testator made a complete and orderly disposition of his property, concluding with the words "I, W. D., say this is my last will and testament," it was held to be manifest that the name was intended as a signature, and to be sufficient.⁵

§ 1254. Same—Attestation of Will by Subscribing Witnesses.

The Virginia statute provides, as we have seen, that "if not wholly written by the testator, the *signature* shall be made, or the *will acknowledged*, by him in the presence of at least two

2. 2 Min. Insts. 1013; Perkins v. Jones, 84 Va. 358, 10 Am. St. Rep. 863, note; Harrison v. Burgess, 1 Hawks (N. C.) 384; Brown v. Beaver, 3 Jones (N. C.) 516; Hill v. Bell, Phill. (N. C.) 122. But see 1 Redfield, Wills, 212, etc., 29; 1 Jarman, Wills, 101 et seq.; Waller v. Waller, 1 Gratt. (Va.) 482, 42 Am. Dec. 571; Beaty v. Beaty, 1 Add. 154, 2 Eng. Eccl. 60.

3. Va. Code, 1904, § 2514.

4. Ramsey v. Ramsey, 13 Gratt. (Va.) 664, 70 Am. Dec. 438; Roy v. Roy, 16 Gratt. 418, 84 Am. Dec. 696; Warwick v. Warwick, 86 Va. 596, 6 L. R. A. 775, 10 S. E. 843; Perkins v. Jones, 84 Va. 362, 363, 10 Am. St. Rep. 863.

5. Dinning v. Dinning, 102 Va. 467, 46 S. E. 473.

competent witnesses, *present at the same time*; and such witnesses shall *subscribe* the will in the *presence of the testator*, but *no form* of attestation shall be necessary."¹

Supposing the will not to be holograph, it will be observed that the statute contemplates both the case where the testator has signed the will before the witnesses are admitted (in which case he is merely to *acknowledge the will* before them) and the case where he *postpones the signing* of the will until he is in the presence of the witnesses. Either method is permissible.

The Virginia statute requires only *two* subscribing witnesses, but where there is a possibility that the will is to dispose of land *in other states*, since some states require *three* witnesses, and since the *lex loci rei sita* controls the validity of wills of land, it is safer to have three witnesses.²

There is usually appended at the foot of the will an attestation clause in some such form as the following, which is subscribed by the witnesses:

"Signed and published by T. T., as and for his last will, in the presence of us, who in his presence and in the presence of each other, have hereunto subscribed our names as witnesses."

Witnesses } E. E.
 } M. W.³

But the Virginia statute expressly declares that "*no form* of attestation shall be necessary," and if the attesting witnesses *subscribe* the will *as witnesses* (though the word "witnesses" do not appear), it is sufficient.⁴

The statutory requirement that the witnesses *subscribe* the will would seem to render it imperative that they sign their names at the *end* of the will; and their signatures elsewhere than at the end would avoid the will.⁵

The student should also note the distinction between the witnesses who *attest* the will and the witnesses called to *prove* the

1. Va. Code, 1904, § 2514.

2. 2 Min. Insts. 1011, 1016; Minor, Conf. Laws, § 11, et seq.

3. 4 Min. Insts. 1613.

4. Peake v. Jenkins, 80 Va. 293.

5. But see Peake v. Jenkins, 80 Va. 293.

will at the probate. *Two* witnesses are not necessary to prove the will, but only to subscribe it. Indeed, the witnesses called to prove may not be the *attesting* witnesses at all, as where the latter are dead, or beyond reach, or insane, etc.⁶

§ 1255. Same—The Competency of the Attesting Witnesses.

The attesting witnesses (two or more in number) must be *competent*. The word employed in the statute, 29 Car. II, c. 3, § 5, and in the Virginia statute down to 1850, was *credible*. However, it was universally agreed that “credible” meant no more and no less than *competent*, so that no progress was made in substituting (as in the later statutes) the one word for the other.¹

We may not pause here to discuss at length what witnesses are or are not *competent*. It must suffice to say that the common law rejects the testimony: (1) Of parties; (2) Of persons deficient in understanding; (3) Of persons wanting in religious belief; (4) Of persons convicted of *infamous* offences, who have been neither pardoned nor punished; and (5) Of persons *interested*, in favor of their interest.²

But in Virginia, great, and it is believed as to some of them, very questionable innovations have been made on the common law in respect to this subject. Thus, it being provided in the Virginia Constitution that the opinions of men in matters of religion shall “in no wise affect, diminish, or enlarge their *civil capacities*,” it is held that the effect is to do away with the third disqualification, and that no one is incapacitated from being a witness by reason of his religious opinions.³

6. 2 Min. Insts. 1036, 1037. See *Pollock v. Glassell*, 2 Gratt. (Va.) 439, 460; *Jesse v. Parker*, 6 Gratt. 64, 52 Am. Dec. 102; *Johnson v. Dunn*, 6 Gratt. 627; *Lambert v. Cooper*, 29 Gratt. 67; *Cheatham v. Hatcher*, 30 Gratt. 60, 32 Am. Rep. 650.

1. 2 Min. Insts. 1013.

2. 2 Min. Insts. 1013, 1014; 1 Greenleaf, Ev., § 327, et seq.

3. 2 Min. Insts. 1014; Va. Const., § 58; *Perry v. Com.*, 3 Gratt. (Va.) 632. *Parties* also are made competent, with some qualifications. Va. Code, 1904, §§ 3345, et seq.

(1383)

Moreover, while there exists in Virginia a general enactment that "no witness shall be incompetent to testify because of *interest*,"⁴ express exceptions are made in respect to the competency of *husband and wife* (with qualifications) as witnesses for or against each other, and in respect to *attesting witnesses* to wills, deeds or other writings.⁵

But while this general abrogation of interest as a ground for the disqualification of a witness is not applicable to *attesting witnesses*, so that such witnesses are in the main subject to the common law rules of disqualification by reason of interest in the establishment or overthrow of the will, there are several special statutory exceptions to this principle which must be noted. The exceptional cases referred to are the following: (1) A *devisee* or *legatee*, or his or her *consort*, as an attesting witness to the will; (2) A *creditor* of the testator, or his or her *consort*, as an attesting witness thereto; (3) The *executor* as an attesting witness thereto. These will now be taken up in their order.

§ 1256. Same—A Devisee or Legatee (or His or Her Consort) as an Attesting Witness to a Will.

It is enacted that "If a will be attested by a person to whom, or to whose *wife* or *husband*, any beneficial interest in any estate is thereby devised or bequeathed, if the will may not be otherwise *proved*, such person shall be deemed a *competent* witness but such devise or bequest *shall be void, except that* if such witness would be entitled to *any share* of the estate of the testator, *in case the will were not established*, so much of his share shall be saved to him as shall not *exceed* the value of what is so devised or bequeathed."¹

4. Va. Code, 1904, § 3345.

5. Va. Code, 1904, §§ 3346, 3346a.

1. Va. Code, 1904, § 2529; 2 Min. Insts. 1014; Croft v. Croft, 4 Gratt. (Va.) 105. But a devisee or legatee who is *not an attesting* witness to a will is not subjected to these terms, but is competent to be examined in support of the will, like any indifferent person, interest being now no disqualification, save in the case of *attesting* witnesses. Martz v. Martz, 25 Gratt. 363, et seq. (1384)

It is a question as yet undetermined in Virginia whether the devise or bequest to an attesting witness, or to his or her wife or husband, is under this statute *void at all events*, or whether it is only void in case it is *necessary* to call upon the attesting witness to *prove* the will when offered for probate, or, in other words, is void only when the will cannot be *otherwise proved*.² The identical language of the Virginia statute, however, has been construed in West Virginia to render the devise to the attesting witness (or his or her consort) void only in the event the will cannot be proved *at the probate* otherwise than by his or her evidence.³

The student will observe also that the purpose of the statute is to *nullify* the interest of the attesting witness not only in *establishing*, but also in *overthrowing*, the will. It is provided, therefore, that if such witness would obtain a share of the decedent's estate (as *heir* or *distributee*) in case the will be not established, so much of the interest given him by the will shall be saved to him as *shall not exceed* the share he would receive as heir or distributee, should the will not be established.⁴

§ 1257. Same—Creditor of Testator (or His or Her Consort) as an Attesting Witness.

"If a will *charging any estate with debts* be attested by a *creditor*, or the *wife* or *husband* of a creditor, whose debt is so charged, such creditor shall, notwithstanding, be admitted a witness for or against the will."¹

This statute has not yet been construed in Virginia, but it would seem that it is applicable in cases where the will charges *some* of the testator's estate with his debts, even though the estate so charged be not sufficient to satisfy the debts (including that of the attesting witness).

2. See 4 Va. Law Reg. 327, 329.

3. *Davis v. Davis*, 43 W. Va. 300, 27 S. E. 323.

4. See Va. Code, 1904, § 2529.

1. Va. Code, 1904, § 2530; 2 Min. Insts. 1015.

§ 1258. Same—Executor as Attesting Witness.

“No person,” says the statute, “shall, on account of his being an *executor* of a will, be incompetent as a witness for or against the will.”¹

§ 1259. Same—Time at Which Attesting Witness Must Be Competent.

The Virginia statute, like its English prototype, has merely declared that the attesting witnesses shall be *competent*, without designating the *date* to which the competency should be referred, that is, whether the witnesses should be competent at the time they *attest or subscribe* the will or at the time they are called upon to *prove* it, namely, when the will is *probated*.

In England, the latter theory was adopted by Lord Mansfield,¹ while the former was strongly maintained by Lord Camden,² whose view seems finally to have carried the day.³ And certainly, this is the more reasonable view, since otherwise no testator could feel secure that his will is valid, for, with whatever care he might select the attesting witnesses, he could have no guaranty that one of them at least would not become insane, commit a crime, die, or otherwise become incompetent before the probate of the will.

In Virginia, while the statute still leaves this doubt unresolved, it would seem clear from the decisions that Lord Camden's view is—in the main, at least,—accepted.⁴ But there is perhaps one

1. Va. Code, 1904, § 2531; *Coalter v. Bryan*, 1 Gratt. (Va.) 18, 87, et seq., 94; *Martz v. Martz*, 25 Gratt. 363; 2 Min. Insts. 1015.

1. *Windham v. Chetwynd*, 1 Burr. 414; *Lowe v. Jolliffe*, 1 W. Bl. 366; *Goodtitle v. Wellford*, 1 Dougl. 141; 2 Min. Insts. 1013.

2. *Hindon v. Kersey*, 1 Bro. Adm. & Civ. L. 284, n. 24; 4 Burns' Eccl. Law, 88; *Bac. Abr. Wills* (D), III; 2 Min. Insts. 1013.

3. *Holdfast v. Downing*, 2 Str. 1254; *Hatfield v. Thorp*, 5 B. & Ald. 589; *Brograve v. Winder*, 2 Ves. Jr. 636; 2 Min. Insts. 1013. See, also, *Sears v. Dillingham*, 12 Mass. 358; *In re Holt's Will*, 56 Minn. 33, 45 Am. St. Rep. 434; *Higgins v. Carlton*, 28 Md. 115, 92 Am. Dec. 666; *Gillis v. Gillis*, 96 Ga. 1, 51 Am. St. Rep. 121.

4. Thus, it is admitted that if the attesting witnesses are *dead* (and it is believed the same principle would apply, if they should become (1386)

exception to the adoption of this view,—in the case of disqualification of the attesting witness by reason of *interest*, where the devisee, or his or her consort, is an attesting witness, for in such case the statute itself seems to refer the witness' competency to the *time of proving* the will.⁵

§ 1260. Same—Signature by Testator or His Acknowledgment of the Will in the Presence of the Attesting Witnesses.

The Virginia statute prescribes that the *signature* must be made, or the *will acknowledged*, by the testator in the presence of the witnesses, *present at the same time*.¹

It is enough that the testator should acknowledge in the presence of the witnesses that the *act was his* (without designating it as *his will*), he himself having knowledge of the contents of the instrument, and the design that it should be the testamentary disposition of his property. In the absence of any contrary proof, the acknowledgment of the instrument is an acknowledgment of its contents and of its execution. If the paper has been subscribed by himself, such an acknowledgment is a recognition and ratification of his signature; and if his name has been subscribed by another, such acknowledgment is a recognition and ratification of the signature as having been made for him in his presence, and by his direction. Of course, the will must be signed before it is attested.²

otherwise incompetent) the will may be probated upon the testimony of other witnesses as to the signatures of the attesting witnesses, etc., which could only be upon the theory that the incompetency of the attesting witnesses at the time of probate does not impair the validity of the will. See 2 Min. Insts. 1037; *Cheatham v. Hatcher*, 30 Gratt. (Va.) 56, 32 Am. Rep. 650; *Johnson v. Dunn*, 6 Gratt. 627; *Pollock v. Glassell*, 2 Gratt. 461; *Smith v. Jones*, 6 Rand. (Va.) 33; *Nalle v. Fenwick*, 4 Rand. 585; *Davis v. Davis*, 43 W. Va. 300, 27 S. E. 323.

5. Ante, § 1256; Va. Code, 1904, § 2529; *Davis v. Davis*, 43 W. Va. 300, 27 S. E. 323.

1. Va. Code, 1904, § 2514.

2. 2 Min. Insts. 1016; *Bac. Abr. Wills* (D), 2; 3 *Lom. Dig.* 43, et seq.; *Rosser v. Franklin*, 6 Gratt. (Va.) 25, 52 Am. Dec. 97; *Beane v. Yerby*, 12 Gratt. 239, 241; *Green v. Crain*, 12 Gratt. 257, 258.

(1387)

§ 1261. Same—Witnesses Must Be Present at Same Time.

The statute requires the attesting witnesses to be present *together and at the same time*, when the testator signs or acknowledges the will; but it does not require them to subscribe their own names *in each other's presence*, but only *in the presence of the testator*, though it is usual for them to be together when they sign, and the customary form of attestation is so worded.¹

Nor is it necessary that the witnesses should have been *expressly* requested in advance by the testator to act in that capacity. The request may be implied from the surrounding circumstances. The request may have been made at the time the will was being subscribed, as well as before, or the testator, without formal request, may acquiesce in and ratify the act of attestation at the time it is done.²

§ 1262. Same—Witnesses to Subscribe Will in Testator's Presence.

The statute is peremptory in requiring that the attesting witnesses shall *subscribe their names* in the *presence of the testator*,¹ the purpose being to guard against forgeries and the fraud-

1. Ante, § 1254; Va. Code, 1904, § 2415; 2 Min. Insts. 1016; *Parra-more v. Taylor*, 11 Gratt. (Va.) 220; *Beane v. Yerby*, 12 Gratt. 239, 244; *Green v. Crain*, 12 Gratt. 257, 258. As to the circumstances and formalities attending the execution of wills, see *Cheatham v. Hatcher*, 30 Gratt. 66, 68, 32 Am. Rep. 650; *Young v. Barner*, 27 Gratt. 105; *Clarke v. Dunnavant*, 10 Leigh (Va.) 13; *Inglesant v. Inglesant*, 10 Eng. Rep. (Moak) 526; *Pearson v. Pearson*, 4 Eng. Rep. 677, 680, notes; *Morritt v. Douglass*, 5 Eng. Rep. 500, 502, note; *Fischer v. Pop-ham*, 13 Eng. Rep. 469.

2. *Savage v. Bowen*, 103 Va. 549, 49 S. E. 668. Nor is it necessary that, prior to the signing, each of the attesting witnesses should have known that the other was to be an attesting witness and had been requested to act in that capacity. *Savage v. Bowen*, *supra*.

1. Va. Code, 1904, § 2514; 2 Min. Insts. 1017. See 6 Va. Law Reg. 193.

ulent imposition of a false will upon the testator in the place of the real one.²

But it is settled that a subscribing witness may attest a will by making his mark, his name being written by another in his presence and at his request; the validity of the attestation depending upon the signing of the name of the witness by his authority and in his presence, and not upon the fact of his making a mark, or doing some manual act in connection with the signature.³

§ 1263. Same—What Is “In the Presence of the Testator.”

The idea of *presence* requires the attestation to occur within the range of the testator's vision, and within a reasonable degree of proximity, in case of one who has the faculty of sight, and with *consciousness* on the part of the testator, of the presence of the witnesses, presence meaning *conscious presence*.¹

To be *in the same room* with the testator, when the witness subscribes the will, is *prima facie* to be in his presence; which, however, may be *repelled* by proof that the testator was so situated relatively to the witness that *he could not see* the act of attestation, and could not, *without help*, place himself in a position to see. If he could see, or could, *without help*, place him-

2. 2 Min. Insts. 1017; 3 Lom. Dig. 51; 4 Kent, Com. 516; 2 Greenleaf, Ev., § 678.

3. 2 Min. Insts. 1017; *Jesse v. Parker*, 6 Gratt. (Va.) 57, 52 Am. Dec. 102.

1. 2 Min. Insts. 1017; *Baldwin v. Baldwin*, 81 Va. 410, 413, 59 Am. Rep. 669; *Tucker v. Sandidge*, 85 Va. 570, 8 S. E. 650; *Chappell v. Trent*, 90 Va. 850, 19 S. E. 314. In case of a *blind man*, proximity no doubt is one criterion of presence, but what other circumstance must concur therewith (supposing the attestation to take place *in the same room*) is not settled by authority, and must be decided when the case occurs. 3 Lom. Dig. 54; *Neil v. Neil*, 1 Leigh (Va.) 22; *Boyd v. Cook*, 3 Leigh 32; *Nock v. Nock*, 10 Gratt. (Va.) 119; 1 Redfield, Wills, 54, 57; 1 Jarm. Wills (5 ed.), 87, n. 2.

self in a position to see, it is immaterial whether he *really did see or not*.²

An attestation *not made* in the same room is *prima facie* not an attestation in *his presence*. But this also may be repelled by showing that from the position *actually occupied* by the testator, he could plainly see the act of attestation. Hence, where a lady went to an attorney's office to execute a will, and the witnesses having seen her execute it as she sat in her carriage, carried it into the office to attest it, it being proved by a person who was in the carriage with her that, through the window of the office the testatrix might see what passed, it was decreed by Lord Thurlow that the will was well attested.³

And so where the testator, from the position occupied by him in his chamber, could see the act of attestation through an open door, at a desk in an adjacent room or hall, notwithstanding the paper and the act were partially concealed from him by the intervening persons of the witnesses, the will was held to be well executed.⁴

But where the will, being attested in an adjoining room, the testator, from the place where he *actually was*, could not see the act, but, if he had been so minded, could easily have placed himself in a position to see it, it was determined, but by a divided court, not to be duly attested.⁵

2. 2 Min. Insts. 1017; 1 Redfield, Wills, 245, et seq.; 3 Lom. Dig. 52, 53; Neil v. Neil, 1 Leigh (Va.) 6; Sturdivant v. Birchett, 10 Gratt. (Va.) 67, 86; Pollock v. Glassell, 2 Gratt. 439; Cheatham v. Hatcher, 30 Gratt. 56, 32 Am. Rep. 650; Baldwin v. Baldwin, 81 Va. 405, 59 Am. Rep. 669.

3. Casson v. Dade, 1 Bro. 99; 2 Min. Insts. 1018; 3 Lom. Dig. 52.

4. Nock v. Nock, 10 Gratt. (Va.) 106; Davy v. Smith, 12 Mod. 37, n. (a); 2 Min. Insts. 1018.

5. 2 Min. Insts. 1018; 1 Redfield, Wills, 246, et seq.; Moore v. Moore, 8 Gratt (Va.) 307. The same principle was applied in Coleman's Case, 3 Curt. (7 Eng. Eccl.) 118; Ellis' Case, 2 Curt. (7 Eng. Eccl.) 225; Reynolds v. Reynolds, 1 Spears (S. C.) 253. See Shires v. Glasscock, 2 Salk. 688; Davy v. Smith, 3 Salk. 395; Doe v. Manifold, 1 M. & S. 294; Winchelsea v. Wauchope, 3 Russ. 441; Tol v. Winchelsea, 2 Car. & P. 488. The Virginia case of Sturdivant v. Birchett (1390)

§ 1264. The Revocation of Wills—In General.

Wills of all kinds are in their nature revocable, or *ambulatory*, as it is styled, and cannot by the most express words be made otherwise, although, to be sure, a *contract* may be disguised under the name and appearance of a will, which, according to the nature of contracts, will be irrevocable.¹

Originally in England, even wills of land might have been revoked *by words only*, the statute of Wills, 32 & 34 Hen. VIII, being silent as to revocations.² The English statute of Frauds,³ however, provided against the mischief which would have ensued, had the omission continued, by enacting that no *devise* in writing should be revoked, except by some other will, codicil, or writing, or by burning, tearing, cancelling or obliterating the same by the testator, or by another in his presence, and by his direction. But to these modes of revocation the courts of chancery added, by *construction and implication*, two others, namely, by a subsequent change of estate on the part of the testator, and by a sub-

chett, 10 Gratt. 67, introduces into this subject a novel construction, which, if it be sustained by future decisions, may go far to frustrate the precautions so jealously thrown around the making of wills. In that case the witnesses, for convenience, took the will, after it had been executed by the testator, into another room, *out of his view*, and there subscribed their names. They then immediately, within one or two minutes, returned to the testator with the paper; and one of them, in the presence of the other, with the paper open in his hand, said to the testator, "Here is your will witnessed;" at the same time pointing to the names of the witnesses, which were on the same page, and close to the names of the testator. The testator then took the paper, looked at it, as if examining it, and then folded it up, speaking of it as his will. It was held, by a divided court (*Allen and Daniel*, JJ., dissenting, that, under these circumstances, the recognition of their attestation by the witnesses to the testator is substantially a subscribing of their names *in his presence*. See 2 Min. Insts. 1018, 1019.

1. 2 Min. Insts. 1021; 6 Va. Law Reg. 389; *Johnson v. Hubbell*, 10 N. J. Eq. 332, 66 Am. Dec. 784, note.

2. 2 Min. Insts. 1021; *Lawson v. Morrison*, 2 Dall. 286, 2 Am. Lead. Cas. 643.

3. 29 Car. II, c. 3, § 6.

(1391)

sequent marriage and birth of a child (or in case of a woman, subsequent marriage alone), which two latter circumstances, however, those courts held to afford a mere *presumption*, which might be repelled, either by other circumstances, or by declarations to the contrary.⁴

The subsequent change in the manner of holding the estate (as if he should sell and afterwards buy it back again), operated a conclusive revocation, not on the basis of the testator's intention, which was wholly immaterial, but on the ground that the statute of wills did not enable one to devise what he *had not at the making* of the will, and the subsequent sale and repurchase was regarded, logically enough, as a new acquisition.⁵

The Virginia statutes have adopted a similar policy by prescribing the modes of revoking wills, only they have declared what shall be *implied* as well as *express* revocations of wills. The subject may accordingly be considered under the two-fold division of: (1) Express revocations; and (2) Implied revocations.⁶

§ 1265. I. Express Revocation of Wills.

"No will or codicil, or any part thereof," says the Virginia statute, "shall be revoked, unless under the preceding section (that is, impliedly, by *marriage*, with some qualification), or by a *subsequent will or codicil*, or by some *writing declaring an intention to revoke* the same, and executed in the manner in which a will is required to be executed, or by the testator, or some person in his presence, and by his direction, cutting, tearing, burning, cancelling or destroying the same, or the *signature* thereto, with the *intent to revoke*."¹

But notwithstanding this emphatic language, the statute itself in subsequent sections provides for an implied revocation, qual-

4. Post, §§ 1267, 1268; 2 Min. Insts. 1021; 3 Lom. Dig. 100, 101; Bac. Abr. Wills (H), 1.

5. 2 Min. Insts. 1021.

6. 2 Min. Insts. 1021; Va. Code, 1904, §§ 2517, et seq., 2527, 2528.

1. Va. Code, 1904, §§ 2517, 2518; 2 Min. Insts. 1021, 1022.

ifiedly, in addition to that wrought by marriage, namely, by the subsequent birth (after the making of the will) of *children who are pretermitted* thereby, as we shall presently see in connection with *implied* revocations.²

And, independently of statute, a *valid conveyance* by the owner of land, subsequent to the execution of his will, to the extent that it is inconsistent with the will, revokes it.³ But if the conveyance be *void* or *voidable*, as by reason of the want of proper formalities, the want of capacity of the grantee to take, or for fraud, though in England it seems to have the effect of revoking the will,"⁴ it is very doubtful if such effect would be given it in this country.⁵

§ 1266. Same—Express Revocation Dependent upon Intention.

Express revocation of every sort depends on *intention*, to be derived, when the revocation is by subsequent will or declaration in writing, from the *words*, interpreted according to law; and when by the cancellation or destruction of the will from the surrounding circumstances, and the act done. And although, when the revocation is by words contained *in writings, parol evidence* is not admissible to *alter* their meaning, yet it may often be employed to prove circumstances which will rebut the *prima facie* inferences to be gathered from words or conduct, showing that the imputed intention did not exist, or that it really applied to

2. Post, § 1272, et seq.; 2 Min. Insts. 1022; Va. Code, 1904, §§ 2527, 2528. See *Lawson v. Morrison*, 2 Dall. 286, 2 Am. Lead. Cas. 638, 643, et seq.

3. *Collup v. Smith*, 89 Va. 264, 15 S. E. 584.

4. 1 Jarman, Wills (4th Ed.) 165; *Montague v. Jeffreys*, Moore, 429; *Hick v. Mors*, Ambl. 215; *Simpson v. Walker*, 5 Sim. 1. It is said, however, that this rule is no longer in force in England, on the theory that as a *valid* conveyance no longer effects a revocation if the title becomes *revested* in testator, one which is *invalid* should be given no greater effect. 2 *Tiffany*, Real Prop., § 417; 1 Jarman, Wills, 133.

5. See *Walton v. Walton*, 7 Johns. Ch. (N. Y.) 258; *Graham v. Burch*, 47 Minn. 171; *Bennett v. Gaddis*, 79 Ind. 347.

something else, and not to the instrument cancelled, destroyed, or revoked.¹

Thus, if the revocation appear to have been founded on a misapprehension of existing circumstances, as upon a mistaken impression in respect to the death of a former legatee, whether it be derived from words or acts, the revocation is inoperative. For example, an English testator, by will dated August, 1790, gave a legacy of £500 each to the grandson and granddaughter of his sister, the parties being described as residing in Virginia, and 5th January, 1791, added a codicil revoking the bequest, the legatees "*being all dead.*" The legatees were not dead, and Lord Chancellor Loughborough held that the legacies were not revoked.² In this case, if the mistaken assumption that the legatees were all dead had not appeared upon the face of the will as the reason for the revocation, the fact that this was the real, though mistaken, cause thereof could not have been shown by extrinsic evidence.³

So, also, if the ground for revocation, as stated by the testator in the codicil, had not been the mistaken assumption of *fact*, but had been a *belief* that the legatees were all dead, upon which *belief* he acted, or if the revocation is stated to be based upon certain *advice* given the testator, though the advice be grounded in misapprehension of the facts, since in these cases the testator is acting upon the *belief* or upon the *advice*, each of which is a *real fact*, the will is revoked.⁴

And so, when any of the words or clauses in a will are erased, merely for the purpose of substituting others which *cannot legally take effect*, the purpose of revocation will be considered *subsidiary* to that of substitution, and both will fail of effect to-

1. 2 Min. Insts. 1025. See *Moureby's Case*, 1 Hagg (3 Eng. Eccl.) 378; *Evans v. Evans*, 10 Ad. & El. 228; *Lawson v. Morrison*, 2 Dall. 286, 2 Am. Lead. Cas. 648, 649; *Skipwith v. Cabell*, 19 Gratt. (Va.) 758.

2. *Campbell v. French*, 3 Ves. Jr. 321; 2 Min. Insts. 1025.

3. *Skipwith v. Cabell*, 19 Gratt. (Va.) 758.

4. *Skipwith v. Cabell*, 19 Gratt. (Va.) 758.

gether.⁵ This principle of "*dependent relative revocation*," as it is sometimes termed, has been applied where a testator has *cancelled* certain clauses of his will, with the intention of substituting others, but without re-executing the will after making the alterations, and the cancellation has been held not a revocation.⁶ And so where a testator destroys his will under the mistaken impression that a previously revoked will would thereby be rendered valid.⁷

§ 1267. Same—1. Express Revocation by Subsequent Will or Codicil, Executed Like a Will.

A subsequent will or codicil, duly executed, operates as a revocation of a former one in all cases where it contains an express clause revoking all former wills, or where it makes a different and incompatible disposition of the land devised by the former one.¹

The *intention to revoke* is what gives effect to the revocation, and therefore, where such an intent appears, the subsequent will or codicil will operate a revocation of the prior will, notwithstanding such subsequent will, etc., may be void from *disability in the devisee* to take, as where it is to the *poor* of the parish of C., or to an *unincorporated association*, etc., in which cases the devise is ineffectual by reason of the uncertainty of the intended beneficiaries. Hence, also, if there be no clause of ex-

5. 2 Min. Insts. 1025; *Short v. Smith*, 4 East, 419; *Locke v. James*, 11 M. & W. 901; *Rippin's Goods*, 2 Curt. 332; *Onions v. Tyrer*, 2 Vern. 742.

6. 2 Tiffany, Real Prop., § 417; *Winsor v. Pratt*, 2 Brod. & B. 650; *Wilbourn v. Shell*, 59 Miss. 205; *Gardner v. Gardner*, 65 N. H. 230; *In re Penniman's Will*, 20 Minn. 245, 18 Am. Rep. 368.

7. *Powell v. Powell*, L. R. 1 Prob. & Div. 209. But the fact that the act of destruction is accompanied by an intention to make another will *in the future* does not prevent the act from effecting a revocation, though the intent to execute a new will be never carried out. 2 Tiffany, Real Prop., § 417; *Brown v. Thorndike*, 15 Pick. (Mass.) 388; *Semmes v. Semmes*, 7 Har. & J. (Md.) 388; *Banks v. Banks*, 65 Mo. 432; *Olmstead's Estate*, 122 Cal. 224.

1. Va. Code, 1904, § 2518; 2 Min. Insts. 1022; 3 Lom. Dig. 102.

press revocation in the subsequent will, and the disposition of the property be not inconsistent with the former will, there is no revocation of the former, but both are good.²

From the principle just stated it follows that, although it appears in proof, and be found, that there was a subsequent will, but it does not appear what were its contents, or whether it even revoked the previous will, or made a disposition of the property incompatible therewith, there is no revocation, not even though it be found that the disposition was different, but in what particulars is unknown.³

§ 1268. Same—2. Express Revocation by Declaration to That Effect, in Writing, Executed Like a Will.

The English statute of Frauds, 29 Car. II, c. 3, makes a difference between the mode of executing *a will* (as to which § 5 requires that the witnesses should *subscribe in the presence of the testator*), and a revocatory *declaration in writing*, as to which § 6 requires that the deviser should sign in the presence of the witnesses, without requiring that the witnesses should *subscribe in the testator's presence*. And this difference led to some subtle distinctions. Thus, it was held that whilst a will might be revoked by a *written declaration*, although the witnesses did not subscribe in the testator's presence, yet it would not be revoked by an instrument intended to *operate as a will*, and containing a clause of revocation, which the attesting witnesses did not subscribe in the testator's presence; and that, not being valid as a will, for which it was designed, it could not be treated as a good *writing* to revoke the first will, it being the sole purpose of such

2. 2 Min. Insts. 1022; 3 Lom. Dig. 102, 103; Coward v. Marshall, Cro. (Eliz.) 721; Gordon v. Whitlock, 92 Va. 723, 24 S. E. 342. For effect of revocation (which fails to take effect) of part of a *residuary clause*, see Prison Association v. Russell, 103 Va. 563, 49 S. E. 966.

3. 2 Min. Insts. 1023; 3 Lom. Dig. 103, 104; Hitchins v. Basset, 2 Salk. 592, n. (a); Goodright v. Harwood, 3 Wils. 497, 511, et seq. See Glasscock v. Smithers, 1 Call (Va.) 479; Bates v. Holman, 3 Hen. & M. (Va.) 502; Hylton v. Hylton, 1 Gratt. (Va.) 161.
(1396)

a writing to revoke or destroy a previous will, and not to make a new disposition of property.¹

In Virginia, however, the present statute obviates all diversities of this kind, requiring the revoking declaration to be *executed like a will*, just as the revoking will or codicil is.²

§ 1269. Same—3. Express Revocation by Cutting, Tearing, Burning, Canceling or Destroying the Will, with Intent to Revoke the Same (Animo Revocandi).

The Virginia statute declares that a will may be revoked by the *testator*, or some one in his presence and by his direction, cutting, tearing, burning, obliterating, canceling or destroying the *will*, or the *signature* thereto, *with the intent to revoke*.¹

In order, by this means, to effect the revocation of a will, there must be done some one of the acts specified, however slight it may be, and with the *specified intent*. Mere words and directions, how pointed and peremptory soever, will not suffice.²

Hence, where a blind man orders his will to be destroyed, and believes that it is destroyed accordingly, but no act is done

1. 2 Min. Insts. 1023; 3 Lom. Dig. 108, 109; *Onions v. Tyrer*, 1 P. Wms. 344, 2 Vern. 741. A similar embarrassment arose, with a like result, while a diversity existed (as was the case in Virginia for some years subsequent to 1834-'5) between the ceremonies prescribed for making wills and revocations of wills of chattels. Under that state of the law, a testator who had made a will of chattels proposed to revoke it by what was intended as a new will, making a different disposition of the property, and containing a clause of revocation. But the latter instrument was not duly executed as a will, although if it had been a mere writing of revocation, it would have been sufficient. It was held that it could not operate in the latter way. 2 Min. Insts. 1023; *Barksdale v. Barksdale*, 12 Leigh (Va.) 535. See *Bates v. Holman*, 3 Hen. & M. (Va.) 502.

2. 2 Va. Code, 1904, § 2518; 2 Min. Insts. 1023.

1. Va. Code, 1904, § 2518. See 7 Va. Law Reg. 455.

2. 2 Min. Insts. 1024; 3 Lom. Dig. 113, 114, 122; *Pemberton v. Pemberton*, 13 Ves. 290; *Doe v. Harris*, 6 Ad. & El. 209; *Malone v. Hobbs*, 1 Rob. (Va.) 346, 39 Am. Dec. 263; *Bates v. Holman*, 3 Hen. & M. (Va.) 502; *Boyd v. Cook*, 3 Leigh (Va.) 32.

towards its destruction, it is not a revocation.³ And so, where a testator destroyed a codicil, and directed a will in another person's custody to be also destroyed, but no act towards it was done, it was no revocation of the will.⁴

On the other hand, any of the acts mentioned, however slight they may have been, if accompanied by the *intent to revoke*, and if the testator, with that intent, has done *all he designed to do* in pursuance of his purpose, will operate a revocation, but not if he abandons his purpose before he completes the act which he designed.⁵

And where a will is found after the testator's death, among his repositories, mutilated or defaced, it is presumed to have been done by himself, and done *animo revocandi*.⁶ So, also, where the testator has his will in his own custody, and after his death it cannot be found, the presumption is that he destroyed it himself.⁷ And if there be duplicates of the will in the possession of different persons, including the testator himself, and that copy in his own custody be not found after his death, all are revoked, for all together constitute but one will.⁸

It appears that if a testator who has *duplicates* of his will in *his possession*, cancels or destroys one of them, and preserves

3. *Boyd v. Cook*, 3 Leigh (Va.) 32; 2 Min. Insts. 1024.

4. *Malone v. Hobbs*, 1 Rob. (Va.) 346, 39 Am. Dec. 263; 2 Min. Insts. 1024.

5. 2 Min. Insts. 1024; 3 Lom. Dig. 116, 117; *Bibb v. Thomas*, 2 W. Bl. 1064; *Doe v. Perkes*, 3 B. & Ald. 489.

6. 2 Min. Insts. 1024; 3 Lom. Dig. 124.

7. 2 Min. Insts. 1024; *Knapp v. Knapp*, 10 N. Y. 276; *Idley v. Bowen*, 11 Wend. (N. Y.) 227; *Foster's Appeal*, 87 Penn. St. 67; *In re Valentine's Will*, 93 Wis. 46. But this presumption may be rebutted by evidence that the will was accessible to others who might have destroyed it, or by showing that the testator's intentions as to the disposal of his property remained unchanged till his death. 2 *Tiffany*, Real Prop., § 417; *Chaplin*, Wills, 358, 361; *Schultz v. Schultz*, 35 N. Y. 653; *Harris v. Harris*, 10 Wash. 555.

8. 2 Min. Insts. 1024; 3 Lom. Dig. 124; *Shacklett v. Roller*, 97 Va. 639, 34 S. E. 492; *Appling v. Eades*, 1 Gratt. (Va.) 286; *Lawrence v. Morrison*, 2 Dall. 286, 2 Am. Lead. Cas. 653, et seq. (1398)

the other in its original condition, the presumption is in favor of a *revocation*; but it may be rebutted by evidence that such was not the intent.⁹ But where he destroys or cancels the *only copy* in his possession, the presumption of revocation is so strong that nothing short of the most direct and positive evidence will justify the inference that an outstanding duplicate is not within the scope of the revoking intention.¹⁰

§ 1270. II. Implied Revocation of Wills—1. Implied from a Subsequent Change of Estate.

In England, as we have seen, implied revocations of wills arose, not out of the terms of the statute of Frauds, 29 Car. II, c. 3, §§ 5, 6, but in spite of very positive provisions in that statute to the contrary, out of the construction of the courts of chancery. The courts, both of law and equity, from the time of the enactment of the statutes of Wills, 32 & 34 Hen. VIII, had assimilated wills of lands to *conveyances*, and were, therefore, by that construction, obliged to consider them as embracing, not such lands as the testator might own *at his death* (as was the construction of wills of *chattels*), but such only as he possessed *at the date of the will*. Hence, if at any time after making his will, he sold the lands then owned by him, the will could no longer be applicable to them, although he should afterwards reacquire them, and die seised thereof. And so, any alteration of the testator's estate after the making of the will would have in like manner the effect to defeat the will, at least *pro tanto*, that is, to the extent of the alteration. Thus arose one of the instances of implied revocation.¹ And this implication long existed under the Virginia statute.²

9. 2 Min. Insts. 1024; *Pemberton v. Pemberton*, 13 Ves. 310; *Roberts v. Round*, 3 Hagg. 548; *Utterson v. Utterson*, 3 Ves. & B. 122.

10. 2 Min. Insts. 1025; *Richard v. Munford*, 2 Phill. 23; *Calvin v. Fraser*, 2 Hagg. 266. See 6 Va. Law Reg. 129.

1. 2 Min. Insts. 1025, 1026; 3 Lom. Dig. 132, et seq.; *Lawson v. Morrison*, 2 Dall. 286, 2 Am. Lead. Cas. 668, et seq.; *Bac. Abr. Wills (H)* 1.

2. 2 Min. Insts. 1026; *Hughes v. Hughes*, 2 Munf. (Va.) 209; *King v. Sheffey*, 8 Leigh (Va.) 619.

But since 1850 the Virginia statute (taken from 7 Wm. IV & 1 Vict., c. 26, § 23) has provided that no conveyance or other act, subsequent to the execution of a will, shall, unless it be an act by which the will is revoked, prevent its operation with respect to such interest in the estate comprised in the will as the testator may have power to dispose of by will at the time of his death.³

It is to be observed, however, that a testator may, notwithstanding the statute, revoke his will by a subsequent conveyance of the land devised, if such disposition be irreconcilable with that made by the will.⁴

§ 1271. Same—2. Revocation Implied from Testator's Subsequent Marriage.

Another *constructive* revocation the courts of equity derived, notwithstanding the peremptory language of the statute of Frauds, 29 Car. II, c. 3, § 6, from considerations of domestic duty and convenience, where, after the making of the will, the testator, if a *woman, married*, or if a *man, married* and had a *child born*. This, however, was founded upon a mere presumption of a purpose on the testator's part to put the will aside, in order to provide for persons who had become thus intimately connected with him; and in the woman's case, upon the additional consideration that a will is in its nature ambulatory, and as after marriage she could not change it, if it were not revoked by the marriage, it would be practically not a will, but a grant.¹

Seeing, therefore, that the implication is founded upon a *presumption* of intention, the courts held that it might be repelled, as we have seen, by showing that no such intention existed, either

3. Va. Code, 1904, § 2520.

4. Collup v. Smith, 89 Va. 258, 15 S. E. 584. For effect as a revocation of the subsequent execution of a *void* or a *voidable* conveyance of the land devised, see ante, § 1265.

1. 2 Min. Insts. 1026; 2 Lom. Dig. 125, 132; Bac. Abr. Wills (H) 1; Sprague v. Stone, 2 Ambl. 721; Phaup v. Woolridge, 14 Gratt. (Va.) 334.

(1400)

by express declarations, or by circumstances, as that the wife and children were adequately provided for otherwise.²

In Virginia, *marriage alone*, without the birth of a child, suffices in general to operate a revocation of a will, whether the testator be *male or female*.

The statute provides that "Every will made by a man or a woman shall be revoked by his or her *marriage*, except a will made in the exercise of a *power of appointment*, when the estate thereby appointed *would not*, in default of such appointment, pass to his or her heir, personal representative, or next of kin."³

Under this statute, marriage by itself, apart from the birth of issue, operates an *absolute* and not a merely *presumptive* revocation of the will, save in the excepted case. Indeed, the later, if not the better opinion, prior to the enactment of the statute of 7 Wm. IV and 1 Vict., c. 26, § 18, was that the revocation was absolute, and incapable of being repelled by any proof of intention on the testator's part not to alter his will. Neither the English nor the Virginia statute admits of any doubt on this point. Save in the excepted case, the revocation wrought by marriage is invariable and without qualification.⁴

The instance excepted stands on obvious grounds. The purpose of the revocation is to provide for the consort and family; but in the case supposed, if the appointment were revoked, the estate appointed would not enure to the benefit of the consort and family; and so, the design of the revocation failing, none takes place.⁵

2. 2 Min. Insts. 1026; 3 Lom. Dig. 126, 127, et seq.; Bac. Abr. Wills (H) 1; Wilcox v. Rootes, 1 Wash. (Va.) 140; Yerby v. Yerby, 3 Call (Va.) 289. But see Doe v. Lancashire, 5 T. R. 49; Marston v. Roe, 8 Ad. & El. 14; Phaup v. Wooldridge, 14 Gratt. (Va.) 334. The principle of this kind of constructive revocation has been incorporated into the Virginia statutes, but with material modifications. Va. Code, 1904, §§ 2517, 2527, 2528.

3. Va. Code, 1904, § 2517 (taken from 7 Wm. IV & 1 Vict., c. 26, § 18); 2 Min. Insts. 1027.

4. 2 Min. Insts. 1027; Phaup v. Wooldridge, 14 Gratt. (Va.) 332; Lawson v. Morrison, 2 Dall. 286, 2 Am. Lead. Cas. 765, et seq.

5. 2 Min. Insts. 1027.

§ 1272. Same—3. Revocation Implied from Subsequent Birth of Pretermitted Children.

The provisions of the Virginia statute upon this subject are as follows: "If any person die leaving a child, or his wife *enceinte* of a child which shall be born alive, and leaving a will made when such person had *no child living*, wherein any child he might have is *not provided for or mentioned*, such will, except so far as it provides for the payment of the debts of the testator, shall be construed as if the devises and bequests therein had been limited to take effect, in the event that the child shall die under the age of twenty-one years, unmarried and without issue."¹

And again: "If a will be made when the testator *has a child living*, and a child be born afterwards, such after-born child, or any descendant of his, if not provided for by any settlement, and neither provided for nor expressly excluded by the will, but only pretermitted, shall succeed to such portion of the testator's estate as he would have been entitled to if the testator had *died intestate*, towards raising which portion the *devisees and legatees* shall, out of what is devised and bequeathed to them, *contribute ratably*, either in kind or in money, as a court of equity in the particular case may deem most proper. But if any such after-born child or descendant, *die under the age of twenty-one years, unmarried and without issue*, his portion of the estate, or so much thereof as may remain unexpended in his support and education, shall *revert* to the person to whom it was given by the will."²

These provisions contemplate two cases, namely: (1) Where there are no *children* at the date of the will; and (2) Where there *are children* at the date of the will.

§. 1273. Same—A. Where There Are No Children at Date of Will.

In this case, whether the child be born before or after the

1. Va. Code, 1904, § 2527; post, § 1273. For case of child *adopted* by testator after execution of will, and who is not mentioned therein, see *Bell v. Jones* (Corp. Ct.), 9 Va. Law Reg. 1070. See ante, § 999.

2. Va. Code, 1904, § 2528; post, § 1274.
(1402)

testator's death, the statute provides that the will shall be construed as if the devises and bequests therein contained had been limited to take effect in the event that the child die under the age of twenty-one, unmarried and without issue; thus, in effect, operating, *pro tanto* at least, a revocation of the will.¹

But in order that this statute may apply, the following circumstances are necessary: (1) There must be no child of the testator living at the time the will is made; (2) A child must be born alive after the will is made; (3) The child may be born before or after the testator's death; (4) The will must not *provide for* any future child of the testator, nor must any possible child be *mentioned* therein; (5) If such pretermitted child die in the testator's life time, leaving issue, the will, it seems, is still revoked.²

§ 1274. Same—B. Where There Are Children at Date of Will, and Others Are Subsequently Born.

Here again, as to the share of such after-born children, the testator's will is by the statute impliedly revoked so as to give them the shares they would have gotten if he had died intestate towards raising which portion or portions the legatees or devisees shall, out of what is given them, contribute *ratably*; which amounts, however, or so much thereof as has not been expended, are to return to those by whom they were contributed in case such after-born child or children should die under twenty-one, unmarried and without issue.¹

In applying this statute the following points are to be noted: (1) The testator must have a child or children living when he executes the will; (2) A child or children must afterwards be born to him; (3) Such after-born child or children must be unprovided for by any *settlement*, and must be neither *provided for* nor *expressly excluded* by the will, but only *pretermitted*,

1. Va. Code, 1904, § 2527; 2 Min. Insts. 1028. See 3 Lom. Dig. 139, et seq.; Yerby v. Yerby, 3 Call (Va.) 334; Savage v. Mears, 2 Rob. (Va.) 570.

2. Va. Code, 1904, § 2527.

1. Va. Code, 1904, § 2528; 2 Min. Insts. 1028, 1029.

and any provision for a child which shows he has not been forgotten will prevent the application of the statute;² (4) Such child or children may, it seems, be born either before or after the testator's death; (5) If such child or children die before the will takes effect, a like provision applies to any descendant of such child; (6) Such child or his descendant is to receive the same portion as if the testator had died *intestate*.³

§ 1275. Republication or Revival of Revoked Wills.

What is meant precisely by the *publication* of a will is not entirely clear. It is supposed to be the declaration by which a person designates that he means to give effect to a paper as his will, although it does not seem to be necessary that he should describe it as being his will; and his *silently* signing it, and procuring witnesses duly to attest it according to the statute, would doubtless be a sufficient declaration.¹

Prior to the statute 29 Car. II, c. 3 (which in terms placed the *republication* of wills on the same footing as their execution), any act or expression was sufficient to set up even a *revoked* will (not physically destroyed), which showed an intention to treat the will as a valid and subsisting instrument. Thus, in that

2. Allison v. Allison, 101 Va. 537, 63 L. R. A. 920, 44 S. E. 904.

3. Va. Code, 1904, § 2528. Some curious results may follow from the application of this statute. Thus, let us suppose a testator to have two children living when he executes his will, and one born afterwards. If he disinherits one or both of the first born in favor of a collateral relative or a stranger, the after-born child would still take his one third. Should the testator devise or bequeath only a small portion of his estate, dying intestate as to the rest, while the after-born child would still receive his one-third, as if the testator had died altogether intestate, it would appear that such one-third must be taken from the portion devised or bequeathed, rather than from that as to which the testator died intestate. If the testator gives his estate in equal parts to his two first born children and a nephew, the after-born child would still take a third of the whole, to make up which share the other children, as well as the nephew, must diminish their shares below that amount.

1. 2 Min. Insts. 1029; Moodie v. Reid, 7 Taunt. 355; Lawson v. Morrison, 2 Dall. 286, 2 Am. Lead. Cas. 675.
(1404)

state of the law, the subsequent verbal "*allowance*" of a will was held a sufficient republication to pass after-acquired lands, if the terms employed adequately comprehended them, as was also a parol declaration that after-acquired lands should go with others previously devised. Republication, apart from and prior to the statute of Frauds, was in fact the converse of a revocation, and, like it, was open to the whole range of parol evidence.²

Republication is of two kinds, express and constructive. *Express*, where the testator *repeats those ceremonies* which are required for the valid *execution* of a will, with the avowed design of republishing it; and *constructive*, where a testator, for some other purpose, makes a codicil to his will, in which case the effect of the codicil, independently of statute, if it contains no internal evidence of a contrary intention, is to republish the will, and thus bring it down to the date of the codicil. The *first* appears to be required in all cases in Virginia.³

The present Virginia statute on the subject (adopted from 7 Wm. IV & 1 Vict., c. 26, § 22) seems to be intended to modify the doctrine as to codicils, by enacting that when a will is revived by a codicil, it shall be so revived only to the extent to which an intention to revive the same is shown.⁴

§ 1276. Same—Effect of Revocation of Revoking Will.

Independently of statute, it is a vexed question whether, if a subsequent will revokes a former will, and be itself revoked, the

2. 2 Min. Insts. 1029; Beckford v. Parnecott, Cro. (Eliz.) 493; Barnes v. Crowe, 2 Ves. Jr. 497; Lawson v. Morrison, 2 Dall. 286, 2 Am. Lead. Cas. 674, et seq.

3. 2 Min. Insts. 1029, 1030; 3 Lom. Dig. 153, et seq.; Lawson v. Morrison, 2 Dall. 286, 2 Am. Lead. Cas. 676; Corr v. Porter, 33 Gratt. (Va.) 278.

4. Va. Code, 1904, § 2519; 2 Min. Insts. 1030; 3 Lom. Dig. 173. The statute is as follows: "No will or codicil, or any part thereof, which shall be in any manner revoked, shall after being revoked, be revived otherwise than by the re-execution thereof, or by a codicil executed in manner hereinbefore required, and then only to the extent to which an intention to revive the same is shown." Va. Code, 1904, § 2519.

former is thereby revived; and upon that point a reasonable distinction appears to be taken between those acts of revocation of the first will which are not essentially *testamentary* in their nature, but *absolute* (e. g., by cancellation or destruction, etc., or by revocatory *declaration* in writing), and those which are contained in *subsequent wills*, etc., which in their nature are ambulatory and revocable; the better opinion being, as it seems, that the effect of an absolute or unconditional revocation is final, and cannot be annulled or varied by any evidence of a subsequent change of intention, short of a republication or re-execution; whilst if the revocation be by a *subsequent will*, its own ambulatory and revocable character is communicated to all acts of which it is made the medium, and that, therefore, the cancellation or other revocation of a *revoking will* is to be regarded as a revival of that which it revoked.¹

This question is effectually put at rest in Virginia by the statute which declares that "no will, or codicil, or any part thereof, which shall be *in any manner* revoked, shall, after being revoked, be revived otherwise than by the re-execution thereof, or by a codicil executed in manner hereinbefore required, and then only to the extent to which an intention to revive the same has been shown."²

Thus, in *Rudisill v. Rodes*,³ the testator, having made a second will revoking a first, subsequently destroyed the second will *onimo revocandi*, and with the intent thereby to revive the first will. He did not, however, re-execute the first will or make a will or codicil reviving it, believing that, as he retained the first will uncanceled, it would *ipso facto* be revived by the destruction of the revoking will. It was held that the first will was not thereby revived.

1. 2 Min. Insts. 1030; *Burtinshaw v. Gilbert*, Cowp. 49; *Goodright v. Glazier*, 4 Burr. 2512, Cowp. 87; *Walton v. Walton*, 7 Johns. Ch. (N. Y.) 258; *Lawson v. Morrison*, 2 Dall. 268, 2 Am. Lead. Cas. 660, et seq.

2. Va. Code, 1904, § 2519; 2 Min. Insts. 1030; 3 Lom. Dig. 152; 1 Jarman, Wills, 145; *Rudisill v. Rodes*, 29 Gratt. (Va.) 151; *Corr v. Porter*, 33 Gratt. 278.

3. 29 Gratt. (Va.) 147.

§ 1277. Same—Effect of Republication of Will.

Republication of a will has a two-fold effect: first, To give the will all the effect of a will made at the time of its republication; and secondly, To set up and re-establish a will that has been revoked.¹

The second of these effects we have already considered.² With regard to the first, it may be said that, since in Virginia wills, in respect to the *property* they dispose of, speak as of the testator's death (unless the contrary intention appear from the will), there is less frequent occasion than formerly to republish a will in order to make it comprehend *more or other property* than it would otherwise do (supposing the phraseology to be unchanged); but in *respect of persons* who are to take there is no such provision, so that, as to them, republication may be as desirable as ever.³

§ 1278. Lapsed Devises—At Common Law.

Where a devisee dies before the testator, the devise,—at least that part of it which refers to the dead devisee,—is at common law liable to become *void*, or, according to the technical phrase, to *lapse*.¹

The general doctrine, at common law, is that a devise lapses in all cases where the devisee dies before the testator. And if the devise be to several, as *tenants in common*, and one of them dies in the testator's lifetime, his share lapses.²

Where, however, the devise is to several persons *jointly*, and one of them dies in the testator's lifetime, his share does not lapse, but *survives*; for although such joint devisees are not

1. 2 Min. Insts. 1030; 3 Lom. Dig. 153; *Corr v. Porter*, 33 Gratt. (Va.) 278.

2. Ante, §§ 1275, 1276.

3. Va. Code, 1904, § 2521; 2 Min. Insts. 1030, 1031; 3 Lom. Dig. 174, et seq.

1. 2 Min. Insts. 1049.

2. 2 Min. Insts. 1049; *Frazier v. Frazier*, 2 Leigh (Va.) 649. See cases *infra*.

joint tenants until the testator's death, yet the gift to them is a gift *pur mie et pur tout* (per totum et per nihil; scilicet, per totum *conjunctim*, et per nihil *separatim*), and so if one should die, whereby, as he has nothing *separately*, his interest ceases to exist, the other or others are entitled *to the whole* as at first, but with no one to share it with them. And as the parties have not become *joint tenants*, the statute³ abolishing survivorship between joint tenants does not apply.⁴

§ 1279. Same—Doctrine in Virginia Touching Lapsed Devises.

In Virginia, it is enacted that "If a devisee or legatee die before the testator, *leaving issue who survives the testator*, such issue shall take the estate devised or bequeathed as the devisee or legatee would have done if he had survived the testator, unless a different disposition thereof be made or required by the will."¹

The purpose of this statute is to prevent a testamentary provision from becoming *void* by reason of a *lapse*, but it has been construed to have the still further effect of validating a provision for the benefit of a devisee or legatee who was *dead even before the will was executed*.²

In the interpretation of this statute, the question presents itself (not yet judicially determined) whether the issue of the deceased devisee take as *purchasers* under the will, or as *heirs* of the deceased devisee. The point is important, since upon it depends the question whether the creditors of the deceased devisee can subject the land thus devised in the hands of the devisee's issue. The better opinion seems to be that they should be re-

3. Va. Code, 1904, § 2430.

4. 2 Min. Insts. 1049; 3 Lom. Dig. 185, 186, n. (2); 1 Jarman, Wills, 340; Wythe's (Va.) Rep. (Minor's Ed.), Appx. 363, et seq.; *Humphreys v. Tayleur*, 1 Ambl. 138; *Skipwith v. Cabell*, 19 Gratt. (Va.) 758, 788; *Lockhart v. Vandyke*, 97 Va. 356, 33 S. E. 613.

1. Va. Code, 1904, § 2523; 2 Min. Insts. 1049.

2. *Wildberger v. Cheek*, 94 Va. 517, 3 Va. Law Reg. 302, 27 S. E. 441.

garded as *purchasers* and not as taking by descent from the deceased devisee.³

Upon the assumption that the statute is intended only to validate devises that under the common law would lapse and become void,⁴ it has no application to cases where *no lapse* would occur at common law. Hence, it cannot be invoked where the devise is to several *jointly*, and one of them dies in the testator's lifetime, leaving issue which survives the testator. For, despite the statute abolishing survivorship between *joint tenants*, these persons, as shown in the preceding section, not being joint tenants until the testator's death, and yet being, by the force and effect of the joint taking, entitled *per nihil separatim et per totum conjunctim*, the share of the party deceased survives to the survivor or survivors, and there is *no lapse*, and therefore no need for the operation of the statute curing lapsed devises.⁵

It will be observed that the statute under consideration does not prevent lapse in all cases, but only where *the devisee leaves issue* who survives the testator. It does not apply if he leaves only *collateral* relatives.⁶ But it is held to be immaterial under the statute whether the devisee is dead at the time of the testator's *death* or at the time the *will is executed*.⁷

§ 1280. Same—Effect of Lapse upon Residuary Clause.

Formerly, as has been shown, wills of *land*, unlike wills of chattels, were held to speak as of the time of their *execution*, and not as of the time of the testator's death.¹

Under this state of the law, therefore, while a *residuary lega-*

3. See 4 Va. Law Reg. 790; 5 Va. Law Reg. 321, et seq.

4. See *Lockhart v. Vandyke*, 97 Va. 356, 361, 5 Va. Law Reg. 303, 33 S. E. 613; 2 Min. Insts. 1049. But see *Hoke v. Hoke*, 12 W. Va. 427, 470; Lom. Ex'ors (2d. ed.) 108, n. 2; Note to *Lockhart v. Vandyke*, 5 Va. Law Reg. 303.

5. 2 Min. Insts. 1049; 1 Jarman, Wills, 354; *Lockhart v. Vandyke*, 97 Va. 356, 361, 5 Va. Law Reg. 303, 33 S. E. 613.

6. Va. Code, 1904, § 2523; *Wood v. Sampson*, 25 Gratt. (Va.) 845.

7. *Wildberger v. Cheek*, 94 Va. 517, 27 S. E. 441; ante, § 1088.

1. Ante, § 1249.

tee in a will of *chattels* would take not only what is undisposed of by the express terms of the will, but also that which in the sequel, at the testator's death, turns out not to have been *effectually and validly* disposed of (for example, *lapsed* legacies and *void* donations of all sorts), a residuary *devisee* could take no more than what was intended for him *at the time of the execution* of the will; and hence a devise that lapsed or otherwise failed would result to the *testator's heir*, and would not go to the residuary devisee.²

But this policy has long been changed in Virginia, and not only is it now provided that a will of *land* as well as of *personalty* "shall be construed to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intent shall appear by the will,"³ but, with special reference to *residuary devises*, it is enacted that "Unless a contrary intention shall appear by the will, such real estate or interest therein as shall be comprised in *any devise* in such will, which shall *fail* or be *void*, or otherwise incapable of taking effect, shall be included in the *residuary devise* (if any) contained in such will."⁴

§ 1281. Probate and Recordation of Wills.

The probate of a will is the official proof made before the

2. 2 Min. Insts. 1009; 4 Kent, Com. 540, et seq.; 2 Redfield, Wills, 115, 117, n. 34; *Durour v. Motteux*, 1 Ves. Sr. 322; *Doe v. Underdown*, Willes, 296; *Cambridge v. Rous*, 8 Ves. 25; *Brown v. Higgs*, 4 Ves. 708, n. b; *Jones v. Mitchell*, 1 Sim. & Stu. 294; *Prison Association v. Russell*, 103 Va. 563, 49 S. E. 966; *Rowlett v. Rowlett*, 5 Leigh (Va.) 26; *Van Kleeck v. Dutch Ref. Church*, 6 Paige (N. Y.) 600, 20 Wend. (N. Y.) 457.

3. Va. Code, 1904, §§ 2521, 2512; *Kent v. Kent*, 106 Va. 199, 55 S. E. 564.

4. Va. Code, 1904, § 2524; 2 Min. Insts. 1010. See *Prison Association v. Russell*, 103 Va. 563, 49 S. E. 966. The words "in any devise" in this section are limited to any devise *other than the residuary clause*. Hence, where three persons were named as residuary devisees, one of whom died intestate without issue in the testator's lifetime, it was held that the testator died *intestate* as to the share of that person. *Kent v. Kent*, 106 Va. 199, 55 S. E. 564.

(1410)

proper and appointed tribunal of the *due execution* of the will, ascertaining it to be the *genuine* and *lawful* expression of the last wishes of the deceased in respect to his property; whereupon it is ordered to be *recorded* as and for the *last will* of the decedent, and the original is deposited and preserved in the clerk's office of the *court of probate*.¹

The student will observe that the *construction* of the will is not submitted to the court of probate. The sole subject for its consideration is, whether the paper in question contains the *last authentic expression* of the decedent's wishes touching the disposition to be made of his property after his death; and whether the *testator is competent* to make such a will. The *meaning* of the paper, or whether it has any meaning at all, must be determined by other tribunals.²

Wills of *chattels* must always be admitted to probate, in order to *avail anything* to the parties who claim under them. Until they thus receive the sanction of the proper court, they cannot be recognized in any court of law or equity.³

But as to a will of *lands*, probate is not indispensable to its *validity*. Such will may, in every case where there is occasion to use it in evidence, be formally proved to have been executed as the statute requires, and that will suffice (except as against *bona fide* purchasers of the land from the testator's heir, *without notice* of the will and for valuable consideration, as we shall see). But the will must be proved afresh in each case.⁴

It is, however, indispensable to the continued security of the devisee's title as against *bona fide* purchasers from the testator's heirs that the will be *recorded* in the clerk's office of the county

1. 2 Min. Insts. 1031; 2 Bl. Com. 508; Robinson, Forms, 285.

2. 2 Min. Insts. 1031.

3. 2 Min. Insts. 1031; 1 Lom. Ex'ors, 215, 197; 2 Bl. Com. 508; Hensloe's Case, 9 Co. 38a; Graysbrook v. Fox, 1 Plowd. 281; Monroe v. James, 4 Munf. (Va.) 194.

4. 2 Min. Insts. 1031; 1 Lom. Ex'ors, 250; Bagwell v. Elliott, 2 Rand. (Va.) 199, 200; Morrison v. Campbell, 2 Rand. 217; Wills v. Spraggins, 3 Gratt. (Va.) 555; Schultz v. Schultz, 10 Gratt. 358, 60 Am. Dec. 335.

or corporation where lies the land devised, and it cannot be thus recorded, in accordance with the statute, until it has been *probated*.

The Virginia statute enacts that "The title of a *bona fide* purchaser, without notice and for valuable consideration, from the heir at law of a person who died having title to any real estate *of inheritance* in this commonwealth shall not be affected by a *devise* of such real estate made by the decedent, unless *within seven years* after the testator's death the will devising the same or, if such will has been proved without this state, an authenticated copy thereof and the certificate of probate, shall be offered for probate before the court having jurisdiction for that purpose, and shall afterwards be admitted to probate and record in the proper court as a will of real estate; provided that, if any devisee under such will is at the time of the testator's death an *infant* or *insane*, the limitation created by this act shall not affect such infant or insane person until after the expiration of *two years from the removal of his or her disability*."⁵

But although, so far as the *original validity* of the devisee's title is concerned, there is no absolute necessity that wills of land should be admitted to probate, provision is made therefor by the Virginia statutes;⁶ and it is very expedient that it be done for the following reasons, apart from the protection thus afforded, as just pointed out, against purchasers from the testator's heirs at law, for value and without notice of the will: (1) Because, when once proved, the will can never afterwards be questioned *collaterally* at all, nor *directly*, save within two years after probate, allowing a short time longer for certain disabilities;⁷ (2) Because, after probate and registry, an *office copy* of the will is as available in evidence as the original;⁸ and (3) Because the original will is thenceforward kept in the clerk's office, which is a safer place of deposit than any private repository.⁹

5. Va. Code, 1904, § 2547a.

6. Va. Code, 1904, §§ 2533, et seq.; 2547.

7. Va. Code, 1904, §§ 2544, 2545; 2 Min. Insts. 1031.

8. 2 Min. Insts. 1031, 1032. See Va. Code, 1904, § 2547.

9. 2 Min. Insts. 1032.

§ 1282. Same—Effect of Condition That Devisee Shall Not Contest Will.

While no attempt will be made in this work to discuss the various sorts of probate and the procedure therein, it may not be amiss to consider the effect of a condition, quite common in wills, that if a beneficiary thereunder contests the validity of the testamentary provisions, he shall forfeit his devise or legacy.

The English authorities quite uniformly distinguish between the case when the benefit is *given over to another* by the will in case the condition is violated, and where it is *not so given over*; holding the condition in the latter case to be merely *in terrorem* and to be disregarded, while in the former holding the condition to be good, and the estate forfeited, if the beneficiary does dispute or contest the will.¹

In Virginia, the same distinction is made, and this would seem to be the better view.²

1. Williams, Ex'ors, 1094; Morris v. Burroughs, 1 Atk. 404; Powell v. Morgan, 2 Vern. 90; Cooke v. Turner, 15 Mees. & W. 727; Loyd v. Spillet, 3 P. Wms. 344; Evanturel v. Evanturel, L. R. 6 P. C. 1; Mallet v. Smith, 6 Rich. Eq. (S. C.) 12, 60 Am. Dec. 107 & note. See Warbrick v. Varley, 30 Beav. 347.

2. Fifield v. Van Wyck, 94 Va. 557, 64 Am. St. Rep. 745, 27 S. E. 446; Chew's Appeal, 45 Penn. St. 228; Mallet v. Smith, 6 Rich. Eq. (S. C.) 12, 60 Am. Dec. 109, note. But see Rogers v. Law, 1 Black 253; Bradford v. Bradford, 19 Ohio St. 546; Shivers v. Goar, 40 Ga. 676, sustaining such conditions *in toto*.

CHAPTER XLV.

TITLE UNDER CONTRACT TO CONVEY.

- § 1283. Outline of Discussion.
- 1284. Executory Contract to Convey or Devise Land, as a Source of Title.
- 1285. Contracts to Convey Land in General Required to Be in Writing and Signed under Statute of Frauds.
- 1286. What Constitutes a Sale or Lease of Land.
- 1287. What Must Be Put in Writing.
- 1288. Nature of the Writing and Material.
- 1289. The Signature.
- 1290. Exceptions in Equity to Statute, Whereby Contracts for Sale of Land May Be Good, though Not in Writing—Enumeration.
- 1291. First Exception—Reduction to Writing, or Signing, Prevented by Fraud.
- 1292. Second Exception—Oral Contract Partly Performed.
- 1293. 1. There Must Be an Act Done, and Merely Abstaining from an Act Is Not Sufficient.
- 1294. 2. The Act Must Be Done by the Party Seeking Relief.
- 1295. 3. The Act Must Be Unequivocal.
- 1296. 4. Act of Alleged Part Performance Must Be Incapable of Compensation in Damages.
- 1297. Same—Statutory Modifications in Virginia of the Doctrine of Part Performance.
- 1298. Third Exception—Where, upon a Bill in Equity to Enforce Oral Contract, the Answer Confesses the Contract.
- 1299. Fourth Exception—Where There Is a Deposit of Title Deeds, as a Security for Money.
- 1300. Fifth Exception—Sales of Fraud under Decree of Court (Judicial Sales).
- 1301. Requisites for Title to Land under Contract of Sale Other than That It Be in Writing—Enumeration.
- 1302. I. The Contract Must Be Certain and Definite.
- 1303. II. The Contract Must Be Equal and Fair.
- 1304. III. The Contract Must Be Mutually Obligatory.
- 1305. IV. The Contract Must Not Be Tainted with Fraud.
- 1306. V. There Must Be No Material Mistake, Misrepresentation nor Misdescription (though Innocent) of the Property Sold under the Contract.

(1414)

- § 1307. Mistake as to Quantity of Interest Transferred.
- 1308. Mistake or Misdescription as to Quantity of Land Transferred.
- 1309. Mistake or Misdescription in Other Respects.
- 1310. VI. The Contract Must Be Supported by Adequate Consideration.
 - 1. In General.
 - 1311. 2. Meritorious Consideration.
 - 1312. 3. Compromise of a Doubtful Right as a Consideration.
 - 1313. 4. Consideration Valuable, but Inadequate.
- 1314. VII. The Contract Must Be Legal, Binding the Party to Do Only What He May Lawfully Do.
- 1315. Discharge by Parol of a Written Contract to Convey Land.

§ 1283. Outline of Discussion.

This subject will be developed under the following heads: (1) Executory contract to convey or devise land, as a source of title; (2) Such contracts in general required to be in writing and signed under the statute of Frauds; (3) Exceptions to the operation of the statute of Frauds; (4) Other requisites of a contract, in order that it may create an equitable title; (5) The discharge by parol of a written contract to convey.

§ 1284. Executory Contract to Convey or Devise Land, as a Source of Title.

The first three sections of the English statute of Frauds¹ leading the way, the corresponding Virginia statute of Conveyances² provides for the transfer of the *legal title* to estates of inheritance or of freehold or for a term exceeding five years *by deed or will* and not otherwise, so far as transfer by act of the parties is concerned.

But *equity*, upon the theory that that should be regarded as done which ought to be done, in accordance with the doctrine of *equitable conversion*,³ recognizes an *equitable title* to the land sold under a contract to convey as vested in the vendee, and

1. 29 Car. II, c. 3, §§ 1, 2, 3.

2. Va. Code, 1904, § 2413.

3. Ante, § 20, et seq., 474.

treats the land as thenceforth belonging in equity to the vendee, and the purchase money as belonging to the vendor, so that upon the death of the former, his *heirs* succeed in equity to his rights in the land, and upon the death of the latter his *personal representative* succeeds to his rights in the purchase money.⁴

Moreover, the court of equity in a proper case, treating the vendor as a trustee of the land for the vendee and the vendee as a trustee of the purchase money for the vendor, will specifically enforce the contract of either against the other, and will compel the vendor, his heirs or devisees, to transfer the legal title to the land to the vendee, his heirs or assignees, while it will likewise compel the vendee or his personal representative to pay the purchase money to the vendor or his personal representative.⁵

But since equity will specifically enforce the contract only in case it conforms to certain requirements as to form and substance, which will be discussed in the following sections, these same requirements must be fulfilled in order that the vendee may acquire an equitable title to the land under the contract of sale or lease.

It is worthy of note that an equitable title to land may be acquired through a contract to *devise*, as well as through a contract to *convey or lease*, land; for, while an agreement to dispose of property cannot, strictly speaking, be specifically enforced, not in the lifetime of a party, because wills are revocable, nor after his death, because it is no longer possible for him to make a will, yet equity can do what is equivalent to specific performance by compelling those upon whom the legal title has descended to convey the property in accordance with the agreement, on the ground that it is charged with a *trust* in the hands of an heir, devisee or purchaser with notice.⁶

4. Ante, §§ 20, 474.

5. Ante, § 474.

6. *Burdine v. Burdine*, 98 Va. 515, 519, 81 Am. St. Rep. 741, 36 S. E. 992; *Hale v. Hale*, 90 Va. 730, 19 S. E. 739; *Rivers v. Rivers*, 3 Desaus. (S. C.) 190; *Parcell v. Stryker*, 41 N. Y. 480; *Johnson v. Hubbell*, 10 N. J. Eq. 332, 66 Am. Dec. 784, note; *Mundorf v. Kilburn*, 4 (1416)

In order that a contract to devise may create an equitable title, the contract must be clearly proved for the devise of a specific tract of land, founded upon adequate consideration and reduced to writing under the statute of Frauds, or else such reduction excused by reason of the occurrence of events which would excuse the reduction to writing of a contract *to convey* land;⁷ and in general it must comply with all the conditions which would be required for the specific enforcement of a contract to convey land, which are now to be considered.⁸

§ 1285. Contracts to Convey Land in General Required to Be in Writing and Signed under the Statute of Frauds.

The common law required *no writing* either to convey lands or to contract to convey them.¹ For the latter class of transactions that law has no security whatever against the fraud and perjury which may be apprehended from the allowance of mere verbal contracts touching a subject so coveted as land; and for the former, it depends exclusively upon the solemnity of *livery of seisin* in the transfer of freehold estates, and of *actual entry* on the part of the lessee, in the creation of leases for years.²

It is a cause of surprise that the necessities of English society did not sooner suggest new provisions upon this subject; but no statute was passed to guard against the mischiefs in question until late in the reign of Charles II (A. D. 1678), when by the famous statute, known as the statute of Frauds,³ very ample and judicious enactments were made, applicable to a number of cases besides conveyances of and contracts for lands, where

Md. 459. See 6 Va. Law. Reg. 389; *Hawkins v. Ball*, 18 B. Mon. (Ky.) 816, 68 Am. Dec. 759, note; *Davis v. Jones*, 94 Ky. 320, 42 Am. St. Rep. 360, note.

7. Post, § 1290, et seq.; *Smith v. Houseman*, 90 Va. 816, 20 S. E. 830; *Miller v. Miller* (Va.), 21 S. E. 471.

8. See authorities cited *supra*.

1. 2 Min. Insts. 659, 843.

2. 2 Min. Insts. 843.

3. 29 Car. II, c. 3.

it was apprehended that fraud, and the attendant perjury to sustain the fraud, would be likely to find a place, if the transaction were not required to be committed to writing. The cases *principally* contemplated by this statute (for there were some subordinate provisions which need not be here stated) were: (1) Conveyances of lands (§§ 1, 2, 3); (2) Contracts for lands, or interests therein (§ 4); and (3) Wills of lands, (§ 5). And so well considered were the provisions of the statute that it has been the model of all the corresponding legislation in the United States, which in relation to executory contracts for, and wills of lands, has been content to follow 29 Car. II, c. 3, and some later statutes on the same topics, with more than usual literalness.⁴

By this statute *executory contracts* for the *sale* or *lease* of lands were provided for (along with a number of other contracts having no relation to land) by enacting that *no action* shall be brought whereby to charge any person upon “any *contract or sale* of lands, tenements, or hereditaments, or any *interest in or concerning* them; unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be *in writing*, and *signed* by the *party to be charged* therewith, or some other person by him thereunto lawfully authorized.”⁵

The corresponding provision in Virginia, which is customarily designated as “the statute of *Parol Agreements*,” enacts that *no action* shall be brought “upon any *contract* for the *sale* of any *real estate*, or for the *lease* thereof for *more than a year*,” unless the contract, or “some memorandum or note thereof, be in writing, signed by the party to be charged thereby, or his agent.”⁶

It will be observed, that the *subject* to which our statute relates differs from that contemplated by 29 Car. II, c. 3, § 4. The latter statute applies to “any contract or sale of lands, etc., or any *interest in or concerning them*,” whilst ours relates to “any

4. 2 Min. Insts. 843, 844. See 3 Min. Insts. 151, for the origin of the statute, which is claimed by Lord Nottingham, in *Ash v. Abdy*, 3 Swanst. 664, for himself.

5. 29 Car. II, c. 3, § 4; 2 Min. Insts. 844.

6. Va. Code, 1904, § 2840; 2 Min. Insts. 845.

contract for the *sale* of any real estate, or for the *lease thereof for more than a year*." Both statutes apply not to actual conveyances of, but only to *executory contracts* for lands; but a contract for a future lease *for a year or less* need not, in Virginia, be in writing, whilst the English statute applies to a contract for *any interest whatever* in lands, etc., be it never so trivial, and demands that it shall be in writing. Our statute *in terms* (whether there be any difference in this particular in *effect* or not), embraces only contracts *for the sale or lease* of lands, whilst 29 Car. II includes contracts for *any interest in or concerning them*.⁷

§ 1286. Same—What Constitutes a Sale or Lease of Land.

What is the precise nature of the *land* or *interest in land*, contemplated by the statute, a contract for which must be in writing, is a vexed question. The doctrine generally recognized seems to be, that in contracts for the sale of things growing upon the land (*fructus naturales*), if the vendee is to have *a right to the soil* for a time, for the purpose of further growth and profit of what is sold, it is an *interest in the land*, and must be proved in writing. But where the thing is sold in prospect of a separation from the soil immediately, or within a reasonable or convenient time, without any stipulation for the beneficial use meanwhile of the soil, but with a mere license to enter and take it away, it is to be regarded as a sale of goods only, and so not within the statute; and that notwithstanding the thing be at present attached to the soil, and although an incidental benefit may be derived to the vendee from the circumstance that the thing may remain for a time upon the land.¹

A fortiori, if the agreement is that the trees or other *fructus naturales*, shall be allowed to gather strength and maturity by remaining on the land longer than one year, or the agreement

7. 2 Min. Insts. 845, 846.

1. Ante, § 42, and cases cited; *McCoy v. Herbert*, 9 Leigh (Va.) 548, 33 Am. Dec. 256; *Stuart v. Pennis*, 91 Va. 688, 22 S. E. 509. But as to *fructus industriales* (emblemments), see ante, § 43. See 5 Va. Law Reg. 860; 6 Va. Law Reg. 50.

permits the gathering of fruit maturing more than a year hence, it comes within the Virginia statute of Parol Agreements, and amounts to a lease of the land for more than one year.²

Another distinction must be glanced at, which is applicable to both statutes, namely, the distinction between a *license* and an *interest in the land*. A license is not within either statute. It is defined to be an authority to do a particular act or series of acts upon another's land without possessing any estate therein. It is revocable before or after it is exercised in whole or in part, supposing it to be truly a license, and to confer no interest in the land; but it is not so revocable as to expose the party licensed to an action for what he has done under the license, as for a tort. Nor is it less revocable because thereby the *licensee* will prove to have made expenditures useless to him. All that he can claim is to have a reasonable time to remove from the premises structures or chattels which he may have put there on the faith of the license,³ or, if the license is the result of a contract, he may claim damages for breach of the contract.⁴

The Virginia statute includes a contract between a purchaser of land and a third person for an interest in the property, whether made before the purchase or afterwards; so that if such agreement be not in writing, etc., it is incapable of being enforced.⁵

Whether contracts touching *trusts in lands* are within the Virginia statute, has not been adjudged; but it would seem that little doubt can exist that they are. In England all doubt is obviated by § 7, of the statute of Frauds (29 Car. II, c. 3), which requires all creations and declarations of trusts to be in writing, signed by the party, or by last will; whilst § 8 excepts *resulting, implied, and constructive trusts*.⁶

2. 2 Min. Insts. 846; Bac. Abr. Leases (C); *United States v. Gratiot*, 14 Pet. 526. See *Stuart v. Pennis*, 91 Va. 691, 692, 22 S. E. 509.

3. Ante, §§ 134, 136, 137; 2 Min. Insts. 846, 847; 1 Washburn, Real Prop. 412, et seq.; 2 Am. Lead. Cas. 648, et seq.

4. Ante, § 136.

5. 2 Min. Insts. 847; *Henderson v. Hudson*, 1 Munf. (Va.) 510; *Walker v. Herring*, 21 Gratt. (Va.) 680, 8 Am. Rep. 616.

6. 2 Min. Insts. 847; 2 Washburn, Real Prop., 191, 192. (1420)

§ 1287. Same—What Must Be Put in Writing.

As to what is to be put in writing under the Virginia statute, it is the *contract* (or a memorandum or note thereof) for the *sale* of land or for the *lease thereof for more than one year*. If therefore the transaction is a present sale, or a present lease, and not a *contract for a future one*, the case is not within the statute of Parol Agreements, but is governed by the statute of Conveyances.¹

To require the *contract* to be in writing of course requires *its terms* to be contained therein;² and would also require the *consideration* to be expressed (though the word "*promise*" would not), were it not that the statute expressly declares that "the consideration need not be set forth or expressed in the writing, and it may be proved (where a consideration is necessary) by other evidence."³

It is important to observe that if the contract be *executed* by the present delivery and acceptance of possession, it is not within the statute of *Parol Agreements*, however the case may be influenced still by the statute of *Conveyances*; it is then a *present lease*, and not a contract for a future one. Hence, if, upon a contract of lease for a term of years, the lessee has entered and occupied the premises, an action *for the rent* is not liable to be repelled under the statute of Parol Agreements, whether the original contract were in writing or not.⁴

§ 1288. Same—Nature of the Writing and Material.

The writing may be ever so informal, if it be intelligible and reasonably certain, setting forth the land to which the contract relates, the estate or interest contracted for, and the terms of

1. Va. Code, 1904, § 2413; 2 Min. Insts. 847.

2. 2 Min. Insts. 847; 1 Sugden, Vendors, 118; Kenworthy v. Schofield, 2 B. & Cr. 945; Saunderson v. Jackson, 2 Bos. & P. 238; Parkhurst v. Van Cortland, 1 Johns. Ch. (N. Y.) 279, et seq., 14 Johns. (N. Y.) 32; Bailey v. Ogden, 3 Johns. 419, 3 Am. Dec. 512.

3. Va. Code, 1904, § 2840; 2 Min. Insts. 847.

4. 2 Min. Insts. 847, 848; Teal v. Auty, 2 Br. & B. 100; Griffith v. Young, 12 East 513, et seq.

payment. It may be in print or in manuscript, written with ink or lead pencil, and is not required, like a deed, to be on paper or parchment; but may be inscribed on stone, steel, leather, linen, wood, or otherwise, so it be only *in writing*. And although the writing must have had the final assent of the parties, it is not requisite that it be *delivered*. Hence, an *undelivered* deed, whilst not good as a deed, may yet be good as a *contract*, supposing it to contain the bargain concluded between the parties, and to be founded upon an actual valuable consideration.¹

As it is immaterial in what form the agreement is, so the parties, the subject matter, and the terms are *clearly expressed* therein, it may be as well by letters as otherwise, or it may be by a clear and distinct reference to some other writing; but the connection between the writings cannot be established by parol; it must appear clearly by a reference, contained in the writing signed, to the other writing.²

§ 1289. Same—The Signature.

The Virginia statute of Parol Agreements requires not only that the contract (or some note or memorandum thereof) be in writing, but also that it be *signed* by the party to be *charged thereby* (that is, the defendant, the party against whom the contract is sought to be enforced), or his agent.¹

Hence, although the terms of the contract be set out in writing ever so plainly, and be ever so solemnly assented to, yet if it be not *signed* it does not avail under the statute; and the fact that the party's agent, or even the party himself, wrote the contract, does not necessarily make his name appearing therein a sufficient

1. 2 Min. Insts. 848; *Brent v. Green*, 6 Leigh (Va.) 16; *Bowles v. Woodson*, 6 Gratt. (Va.) 78; *Parrill v. McKinley*, 9 Gratt. 1, 58 Am. Dec. 212.

2. 2 Min. Insts. 848; 2 Lom. Dig. 45, et seq.; *Clinan v. Cook*, 1 Sch. & Lefr. 22; *Boydell v. Drummond*, 11 East 142; *Stratford v. Bosworth*, 2 Ves. & B. 341; *Huddleston v. Briscoe*, 11 Ves. 591; *Fitzhugh v. Jones*, 6 Munf. (Va.) 83; *Darling v. Cumming*, 92 Va. 521, 23 S. E. 880.

1. Va. Code, 1904, § 2840.
(1422)

signing, unless it appears that the writing contains the terms of final agreement, and that the name was *designed as a signature*. There is no particular place which the name must occupy in order to constitute it a signature; nor is it necessarily the sign manual of the party or of his agent. It is enough if it be affixed in the presence and by the direction of the party himself, or his agent, as the case may be; and may be at the beginning, or the end, or in the middle, provided only the collocation and connection be such as to authenticate the whole instrument. So it is a signature (because it *authenticates* the instrument, which is what the statute aims at), although it consists of the *surname* only, or even merely *of the initials*. The courts have gone so far as to hold that, as the only purpose of the statute was to cause the writing to be *authenticated*, if a person knowing the contents should sign it only *as a witness*, it is a signing within the statute.²

It is not necessary that the writing should be signed by *both parties*; it is enough if it be signed by the *party to be charged thereby*;³ nor does this doctrine conflict, as Lord Redesdale supposed in *Lawrenson v. Butler*,⁴ with the principle that in every contract there must be *mutuality* of obligation, for the statute determines nothing as to the *obligation* of the contract, but only forbids *any action* to be brought thereon, unless the contract be *in writing*, etc.; and moreover, when the other party institutes proceedings upon the contract, he thereby in writing consents to it.⁵ But when the applicant for the enforcement of the

2. 2 Min. Insts. 848, 849; 2 Lom. Dig. 44; *Stokes v. Moore*, 1 P. Wms. 770, note, 1 Cox. 211; *Welford v. Beazley*, 3 Atk. 503; *Coles v. Trecothick*, 9 Ves. 234; *Ogilvie v. Folijambe*, 3 Meriv. 62; *Phillimore v. Barry*, 1 Campb. 513; *Argenbright v. Campbell*, 3 Hen. & M. (Va.) 144, 187; *Augsburg Land Co. v. Pepper*, 95 Va. 92, 27 S. E. 807.

3. *Central Land Co. v. Johnston*, 95 Va. 226, 28 S. E. 175; 2 Min. Insts. 849.

4. 1 Sch. & Lefr. 13. -

5. 2 Min. Insts. 849; 2 Lom. Dig. 43; *Fowle v. Freeman*, 9 Ves. 351; *Seton v. Slade*, 7 Ves. 265; *Ballard v. Walker*, 3 Johns. (N. Y.) 60; *Clason v. Bailey*, 14 Johns. 486; *Central Land Co. v. Johnston*, 95 Va. 226, 28 S. E. 175.

contract is the *only party who has signed it*, the statute bars the proceeding.⁶

The contract, it will be remembered, may be authenticated as well by the signature of the *agent* as of the party himself. Nor, in Virginia, is it needful that the authority of the agent should be *in writing*, although it must be satisfactorily proved, and the agent must conform to it; nor is the principal bound beyond the extent of the authority he delegates.⁷

It has been for a considerable time established that an auctioneer is, *at the sale*, the agent of both parties, and by *then* writing their names in connection with a minute of the contract, showing the subject, the parties, and the terms, may bind either or both under the statute. And notwithstanding the maxim, *delegatus non potest delegare*, it has been held, apparently from the necessity of the case, that an entry made by the *auctioneer's clerk* is of like validity as if made by the auctioneer himself. The auctioneer's power, however, to bind the *purchaser* continues only in immediate connection with the sale, and must be exercised *at the time and on the spot*. With regard to the *seller*, the auctioneer is his agent peculiarly, selected and paid by him, and acting in his interests; and as to him, therefore, the agency is justly regarded as continuing until the close of the whole transaction.⁸

Finally, it should be remembered that *one party* cannot be the agent for the *other*, not the seller for the purchaser, nor the

6. 2 Min. Insts. 849.

7. 2 Min. Insts. 849, 850; 2 Lom. Dig. 45; *Coles v. Trecothick*, 9 Ves. 250; *Clason v. Bailey*, 14 Johns. (N. Y.) 490; *Augsburg Land Co. v. Pepper*, 95 Va. 92, 27 S. E. 807; *Yerby v. Grigsby*, 9 Leigh (Va.) 387. From this last case it would seem that the agent may sign *his own name* to the contract and thereby bind his principal; a proposition not in conformity with the general common law doctrine touching contracts made by agents, but sustained by *Kemeys v. Proctor*, 3 Ves. & B. 57; *Coles v. Trecothick*, *supra*; *White v. Proctor*, 4 Taunt. 209.

8. 2 Min. Insts. 850; 7 Va. Law Reg. 349. See *Brent v. Green*, 6 Leigh (Va.) 16; *Smith v. Jones*, 7 Leigh 163, 30 Am. Dec. 498; *Walker v. Herring*, 21 Gratt. (Va.) 682, 8 Am. Rep. 616.
{1424}

purchaser for the seller.⁹ In *Brent v. Green*,¹⁰ the sale was made by a deputy sheriff, acting for his principal, and the subject sold was the land of an insolvent debtor, which he had surrendered upon taking the insolvent debtor's oath. The deputy sheriff, acting as auctioneer, made a rude memorandum on a bit of paper, setting forth what it was he was selling, the price bid, and the name of the purchaser. The purchaser resisted the enforcement of the contract, upon the ground that, even if an auctioneer was in general the agent of both parties, it could not be so here, for the auctioneer was *himself the vendor*. The objection was overruled, the court holding that it was established law that the auctioneer was the agent of both parties, as above explained, and that the deputy sheriff in the case under consideration, who was the auctioneer, was not the vendor, but the high sheriff was, the property of the insolvent being vested by law in him.¹¹

§ 1290. Exceptions in Equity to Statute, Whereby Contracts for Sale of Land May Be Good, though Not in Writing—Enumeration.

Exceptions to the application of the statute of Frauds (or Parol Agreements) arise *in equity*, in the five cases following, viz.: (1) Where the reducing of the agreement to writing, or the signing of it, is prevented by the *fraud* of the opposite party; (2) Where the agreement has been *partly performed*; (3) Where, upon application to a court of equity to enforce the contract, the answer *confesses the contract*; (4) In case of deposit of title deeds as security for money; and (5) In case of sales made *under decree of a court of chancery*.¹

9. 2 Min. Insts. 850; *Farebrother v. Simmons*, 5 B. & Ald. 120; *Brent v. Green*, 6 Leigh (Va.) 16. See *McComb v. Wright*, 4 Johns. Ch. (N. Y.) 659; *Gill v. Bicknell*, 2 Cush. (Mass.) 355; *Mews v. Carr*, 1 H. & N. 484; *Buckmaster v. Harrop*, 13 Ves. 456; and cases cited *supra*, note 8.

10. 6 Leigh (Va.) 16.

11. 2 Min. Insts. 850.

1. 2 Min. Insts. 851.

(1425)

§ 1291. First Exception—Reduction to Writing, or Signing, Prevented by Fraud.

When, by the *fraud of the promisor*, it has been brought about that the agreement has not been put into writing, or has not been signed, a court of equity will carry the agreement into effect, without regard to the statute. It would, indeed, be a singular anomaly, were it otherwise; for then a statute, of which one principal object was to prevent fraud, would be made to minister to and assist it. Thus, where a father, on a treaty for the marriage of his daughter with the plaintiff, executed a writing comprising the terms of the agreement, and afterwards, designing to elude it, directed his daughter to get the plaintiff to deliver it up, and then to marry him, which she did, the plaintiff was relieved. And in another case, where instructions were given, and preparations made for the drawing of a marriage settlement, but before the completion of it, the woman was induced, by the assurance and promise of the man that he would perform it, to marry him, equity notwithstanding enforced it.¹

§ 1292. Second Exception—Oral Contract Partly Performed.

When an *oral* agreement for the purchase and sale of lands has been *in part performed*, and the act of part performance places the plaintiff in a situation which is a *fraud upon him unless the agreement is executed*, the courts of equity will not permit the defendant to protect himself against the execution of the contract by alleging that it was not in writing. That would be, as has been pithily said, *to sanction fraud in order to prevent perjury*.¹ And although it has been lamented that the courts of equity ever departed in this particular from the precise terms

1. 2 Min. Insts. 851; 2 Lom. Dig. 49, 50; *Montacute v. Maxwell*, 1 P. Wms. 618.

1. 2 Min. Insts. 851; *Heth v. Wooldridge*, 6 Rand. (Va.) 607, 18 Am. Dec. 751; *Wilde v. Fox*, 1 Rand. 165; *Hale v. Hale*, 90 Va. 728, 19 S. E. 739; *Hudson v. Max Meadows Land, etc., Co.*, 97 Va. 341, 33 S. E. 586.

(1426)

of the statute, yet the jurisdiction is now too firmly established to be shaken otherwise than by statute. The doctrine, however, is reluctantly applied, and never further than the adjudged cases and the principles established by them require.² The Virginia legislature has curtailed somewhat the doctrine of part performance, as we shall see hereafter.³

The circumstances of part performance to take the case out of the statute, and to induce the court of equity to decree specific execution of a *parol* contract for lands, must have the following characteristics, viz: (1) There must be an *act done*, and merely *abstaining from an act* is not sufficient; (2) The act must be done by the party seeking the aid of the court; (3) The act must be done unequivocally in consequence of the agreement, with a design to perform it, and be such as but for the agreement would not have been done; and (4) The act must be of a character incapable of compensation in damages.⁴

§ 1293. Same—1. There Must Be an Act Done, and Merely Abstaining from an Act Is Not Sufficient.

Thus, if two persons desire to buy portions or all of the same tract of land, and in order not to inflame the price, it is agreed by *parol* between them, that one alone shall offer to buy, and that they will share the land in agreed proportions, the *abstaining* from the act of *bidding or offering* for the land is not such an act of part performance as will warrant the court of equity to decree specific execution of the agreement, however clearly proved.¹

2. 2 Min. Insts. 852; 2 Lom. Dig. 56; *Anthony v. Leftwich*, 3 Rand. (Va.) 238.

3. Post, § 1297.

4. 2 Min. Insts. 852, 853; *Wright v. Pucket*, 22 Gratt. (Va.) 370; *Lester v. Lester*, 28 Gratt. 737, et seq.; *Halsey v. Peters*, 79 Va. 60; *Griggsby v. Osborn*, 82 Va. 373; *Hudson v. Max Meadows Land, etc., Co.*, 97 Va. 341, 33 S. E. 586; *Henley v. Cottrell Real Estate Co.*, 101 Va. 70, 43 S. E. 191; *Plunkett v. Bryant*, 101 Va. 814, 45 S. E. 742.

1. 2 Min. Insts. 853; *Lomas v. Bailey*, 2 Vern. 627; *Henderson v. Hudson*, 1 Munf. (Va.) 510; *Heth v. Woolridge*, 6 Rand. (Va.) 611, 18 Am. Dec. 751; *Walker v. Herring*, 21 Gratt. (Va.) 678, 8 Am. Rep. 616.

§ 1294. Same—2. The Act Must Be Done by the Party Seeking Relief.

This follows from the foundation itself of the doctrine under consideration; for it is impossible that the plaintiff can be placed in a situation where not to enforce the contract would be a fraud *upon him*, by an act of part performance done by the opposite party, or by any one but himself.¹

It is sometimes said loosely, that delivery of possession *to the vendee* is an act of part performance which will justify the court in compelling the *vendor* to execute the contract at the vendee's instance; and this has been thought by some to be an exception to this second principle; but it is the *taking possession* by the vendee, and not the delivery of possession by the *vendor*, which constitutes the equity of the case.²

§ 1295. Same—3. Act Must Be Unequivocal.

The act, alleged to be an act of part performance, must be done *unequivocally*, in consequence of the agreement, with a design to perform it, and must be such as, but for the agreement, would not have been done.¹

Hence, *delivery* of possession by vendor is ground for a suit by him, as *taking* possession by the vendee is on his part. And the vendee's case is much strengthened when he has laid out his money in improvements on the land.²

Hence, too, the mere *continuing in possession* by one who has the possession already under a former interest (*e. g.*, under a lease), not involving any new act, or at least any *unequivocal*

1. 2 Min. Insts. 853; *Buckmaster v. Harrop*, 7 Ves. 341, 346.

2. 2 Min. Insts. 853.

1. 2 Min. Insts. 853. See *Wright v. Puckett*, 22 Gratt. (Va.) 370; *Pierce v. Catron*, 23 Gratt. 588; *Hudson v. Max Meadows, etc., Co.*, 99 Va. 537, 39 S. E. 215; *Henley v. Cottrell Real Estate Co.*, 101 Va. 70, 43 S. E. 191; *Plunkett v. Bryant*, 101 Va. 814, 45 S. E. 742.

2. 2 Min. Insts. 853; *Anthony v. Leftwich*, 3 Rand. (Va.) 238; *Payne v. Graves*, 5 Leigh (Va.) 561; *Pigg v. Corder*, 12 Leigh 80; *Com. v. Ricks*, 1 Gratt. (Va.) 427; *Parrill v. McKinley*, 9 Gratt. 1, 58 Am. Dec. 212; *Rhea v. Jordan*, 28 Gratt. 682, et seq.

(1428)

act, is in general not sufficient on either side, whether of vendor or vendee. It is said, however, that if the tenant, after the expiration of the old lease, not only continues in possession, but pays an *increase of rent*, according to the terms of a parol contract for a new lease, to commence on the expiration of the old one, it is such an act of part performance as will take the case out of the statute; which must be because the payment of the increased rent renders the *continued possession an unequivocal* act of part performance of the new lease; for it is believed that it is the continuing in possession, thus ascertained to be in fulfillment of the parol contract for the new lease, and not the mere payment of the rent, which constitutes the act of part performance.³

The expenditure of money by a lessee in improvements on the premises, and especially if the expenditure was made in pursuance of the stipulations of the lease, or with the knowledge of the lessor, will also render the act of continuing in possession an unequivocal act of part performance by the lessee, and will entitle him to a specific execution of the oral contract, provided it cannot be compensated in damages.⁴

When the contract is *entire*, and embraces several parcels of land, *delivery* of possession of any one of them by the vendor, or *taking possession* by the vendee, will take the case as to all the parcels, out of the statute.⁵ But the viewing of the estate by the parties, having it or the timber on it valued, giving directions for a conveyance, and the like, are not acts of part performance, but are merely introductory and preliminary to a contract, and at most *equivocal*.⁶

In this aspect it is (namely, that the acts shall not be equivocal), that the conduct of the applicant for a specific execu-

3. 2 Min. Insts. 854; 2 Lom. Dig. 52.

4. 2 Min. Insts. 854; 2 Lom. Dig. 52, 53; *Rhea v. Jordan*, 28 Gratt. (Va.) 682, et seq.; *Henley v. Cottrell Real Estate Co.*, 101 Va. 70, 43 S. E. 191; *Plunkett v. Bryant*, 101 Va. 814, 45 S. E. 742.

5. 2 Min. Insts. 854; 2 Lom. Dig. 53.

6. Min. Insts. 854; *Hudson v. Max Meadows, etc., Co.*, 99 Va. 538, 540, 39 S. E. 215.

tion may ascertain what would otherwise have been an act of part performance, not to be such. Thus, where the vendee has taken possession of the premises, and paid part of the purchase money, and being sued for the residue, defeats the action by pleading the statute of Parol Agreements, he cannot afterwards have in equity a specific execution of the contract which he has disaffirmed and abandoned, but is entitled only to have the purchase money he has paid refunded to him.⁷

§ 1296. Same—4. Act of Alleged Part Performance Must Be Incapable of Compensation in Damages.

It is manifest, if the act is capable of compensation in *damages*, that it cannot be justly said to place the plaintiff in a situation which would be a *fraud* upon him, unless the agreement were *specifically enforced*, and therefore the only ground of the cognizance of equity in such case fails. Accordingly, it is now established, notwithstanding some early fluctuations of opinion in the English court of chancery, that the mere payment of the *purchase money*, in whole or in part, is not a sufficient act of part performance; for the money may be repaid with interest, and then the parties, as Lord Redesdale observes, will be just as they were before.¹

So, for a like reason, if the consideration was not money, but services and labor, if the latter were capable of being fairly estimated in money, they would not amount to an act of part performance.²

Whether the fact that the vendor is *insolvent*, so as to make

7. 2 Min. Insts. 854; 2 Lom. Dig. 56; *Payne v. Graves*, 5 Leigh (Va.) 567.

1. 2 Min. Insts. 855; 2 Lom. Dig. 54; *Clinan v. Cooke*, 1 Sch. & Lefr. 41; *Ex parte Hooper*, 19 Ves. 480; *Jackson v. Cutright*, 5 Munf. (Va.) 318; *Anthony v. Leftwich*, 3 Rand. (Va.) 255; *Allen v. Smith*, 1 Leigh (Va.) 231; *Henley v. Real Estate Co.*, 101 Va. 70, 43 S. E. 191; *Plunkett v. Bryant*, 101 Va. 814, 45 S. E. 742.

2. 2 Min. Insts. 855, 856; 2 Lom. Dig. 34. See *Bowman v. Wolford*, 80 Va. 213; *Lester v. Foxcroft*, 1 White & Tud. Lead. Cas. Eq. 525; *Rhodes v. Rhodes*, 3 Sandf. (N. Y.) 279, 284. See *Venable v. Stamper*, 102 Va. 36, 45 S. E. 738.

the recovery of the purchase money which has been paid impracticable, would be a ground for the interposition of equity, is not known to have been decided; but as, in that event, not to compel the execution of the contract would operate a fraud upon the purchaser, it would seem to come within the principle upon which a court of equity founds its action in such cases.³

§ 1297. Same—Statutory Modifications in Virginia of the Doctrine of Part Performance.

Prior to 1887, it was held by a line of Virginia decisions that an *oral gift* of, or an *oral* agreement to *give* land to a relative, accompanied by possession, by reason of which the donee has been induced to alter his condition, and to make expenditures in improvements upon the land, would be specifically enforced, and the *equitable title* would pass to the *donee*.¹

But since 1887, this result has been altered by the Virginia statute, enacting that no "right to a conveyance of any such estate (that is, of inheritance or freehold, or for a term of more than five years), shall accrue to the *donee* of the land or those claiming under him, under a *gift* or *promise of a gift* of the same hereafter made and *not in writing*, although such gift or promise be followed by *possession* thereunder and *improvement* of the land by the donee or those claiming under him."²

Again, prior to 1887, the statute requiring the registry of contracts to convey land as against *creditors* of, and *subsequent purchasers* from, the vendor, was construed to apply only where the contract passing the equitable title from the vendor to the vendee was *in writing*, and hence it was held that an *oral* contract for valuable consideration, *partly performed*, which also would transfer an equitable title from vendor to vendee, did not come within the registry statute, and that such a contract therefore conferred a complete equitable title upon the vendee, as

3. 2 Min. Insts. 856. See 2 Story, Eq. Jur., §§ 760, 761.

1. Halsey v. Peters, 79 Va. 60; Griggsby v. Osborn, 82 Va. 373. See Nicholas v. Nicholas, 100 Va. 664, 42 S. E. 669, 866.

2. Va. Code, 1904, § 2413; 2 Min. Insts. 852; Nicholas v. Nicholas, 100 Va. 660, 42 S. E. 669, 866.

against the vendor's *creditors*, obtaining liens by judgment or attachment after the execution of the contract.³

But since the Code of 1887, it has been enacted that "every contract, *not in writing*, made in respect to real estate or goods and chattels, or in consideration of marriage, or made for the conveyance or sale of real estate or a term therein for more than five years, shall be void both at law and in equity, as to purchasers for valuable consideration without notice and creditors."⁴

Aside from these legislative provisions, the oral contract to convey, partly performed, is as effective in Virginia as it ever was to pass an equitable title to the vendee.

§ 1298. Third Exception—Where, upon a Bill in Equity to Enforce the Oral Contract, the Answer Confesses the Contract.

It is the admitted doctrine that if, upon a bill in equity to compel the performance of a parol contract, as to which there has been no part performance, and the defendant by his answer *confesses* the agreement *without insisting on the statute*, the court will decree the execution; for there can be no danger in such cases either of fraud or perjury, which it was the object of the statute to prevent;¹ and if the defendant admits the contract in his answer to the original bill, and submits to perform it, he cannot take advantage of the statute afterwards in an answer to an amended bill.²

But where the defendant by his answer admits the contract as set forth in the bill, but *insists on the statute*, the court can-

3. 2 Min. Insts. 949; Withers v. Carter, 4 Gratt. (Va.) 407, 50 Am. Dec. 78; Floyd v. Harding, 28 Gratt. 401; Hicks v. Riddick, 28 Gratt. 418; Long v. Hagerstown, etc., M'fg Co., 30 Gratt. 669; Burkholder v. Ludlam, 30 Gratt. 259, 32 Am. Rep. 668; Halsey v. Peters, 79 Va. 60; Peery v. Elliott, 101 Va. 711, 44 S. E. 919.

4. Va. Code, 1904, § 2463; Braxton v. Bell, 92 Va. 229, 23 S. E. 289; 1 Va. Law Reg. 682, note.

1. 2 Min. Insts. 856; Cottingham v. Fletcher, 2 Atk. 155; Lacon v. Martin, 3 Atk. 3.

2. 2 Min. Insts. 856; Spurrier v. Fitzgerald, 6 Ves. 548.
(1432)

not withhold the benefit of it from him, the admissions in his answer, however explicit, being deemed immaterial in order to deprive him of the protection of the statute.³

§ 1299. Fourth Exception—Where There Is a Deposit of Title Deeds, as a Security for Money.

In England the doctrine has prevailed for nearly a century that the mere deposit of title deeds upon an *advance of money*, without a word passing, much less *any writing*, gives an equitable lien on the land for the money, even as against a purchaser for value, without notice. This very extraordinary nullification, as far as it goes, of the statute law of the land, was first established by the case of *Russel v. Russel*,¹ and has since been often regretted, and as often confirmed.²

The doctrine has never been allowed foothold in Virginia, our courts holding it to be in absolute conflict with the statute of Parol Agreements, the statute of Conveyances, and the statute of Registry.³

§ 1300. Fifth Exception—Sales of Land under Decree of Court (Judicial Sales).

In the case of *Attorney General v. Day*,¹ Lord Hardwicke

3. 2 Min. Insts. 856; 2 Lom. Dig. 56, 57; *Cooth v. Jackson*, 6 Ves. 17; *Blagden v. Bradbear*, 12 Ves. 466.

1. 1 Bro. Ch. 269.

2. Ante, §§ 615, 616; 2 Min. Insts. 856; 2 Th. Co. Lit. 36, n. (Z); *Coming, Ex parte*, 9 Ves. 118, n. (1); *Ex parte Haigh*, 11 Ves. 403; *Hiern v. Mills*, 13 Ves. 114; *Ex parte Mountfort*, 14 Ves. 606; *Ex parte Coombe*, 17 Ves. 370; *Ex parte Kensington*, 2 Ves. & B. 83. It would seem that the idea ought to have been effectually repelled by the single observation made by Lord Kenyon, then at the bar, and of counsel against the doctrine: "The claim is against the law of the land; it would be charging land without writing, which is against the fourth clause of the statute of Frauds."

3. 2 Min. Insts. 857; Va. Code, 1904, §§ 284, 2413, 2463, et seq.; *Colquhoun v. Atkinson*, 6 Munf. (Va.) 566; *Siter v. McClanachan*, 2 Gratt. (Va.) 280. See ante, §§ 615, 616.

1. 1 Ves. Sr. 221.

was of the opinion that the common case of purchasers "*before the master,*" or, as we should say, before a commissioner of the court, was certainly out of the statute, the official character of the commissioner, his report to the court, and the subsequent action of the court upon his report in the confirmation thereof, being deemed a sufficient protection against perjury and fraud.²

The proposition is sometimes stated as if because confirmation by the court is essential to make the agreement unsigned by the purchaser completely obligatory upon him, that therefore he was, before confirmation, at liberty to repudiate it. This, however, is believed to be a misapprehension, and, upon the master's report of the sale, and the confirmation thereof by the court, the purchaser is bound by relation as from the sale, in despite of any protest or attempt at repudiation which he may have made before confirmation. And in this sense it is that judicial sales are said to be not within the statute of Frauds.³

§ 1301. Requisites for Equitable Title to Land under Contract of Sale Other Than That It Be in Writing—Enumeration.

In the preceding sections we have examined, for the creation of an equitable title under a contract to convey, the single requirement (imposed by the statute of Frauds, and the corresponding Virginia statute of Parol Agreements) that the contract must, in general at least, be in writing, signed by the party to be charged thereby, or his agent.

But there are other requirements also to be met before a court of equity will specifically enforce such a contract, even though it be in writing and duly signed, and hence these same requirements must be satisfied before an equitable title will arise under the contract.

2. 2 Min. Insts. 857; 1 Sugden, Vendors, 114; Fry, Spec. Perform., § 376; Rorer, Judicial Sales, § 135, et seq.; 2 Lom. Dig. 43; Brent v. Green, 6 Leigh (Va.) 24; Robertson v. Smith, 94 Va. 250, 64 Am. St. Rep. 723, 26 S. E. 579; Blagden v. Bradbear, 12 Ves. 472.

3. 2 Min. Insts. 857; Warfield v. Dorsey, 39 Md. 299; Kaufman v. Walker, 9 Md. 240; Harrison v. Harrison, 1 Md. Ch. 331; Wood v. Mann, 3 Sumn. 310, 318.

These additional requirements supposing the parties to be *competent to contract*, may be enumerated as follows: (1) The contract must be certain and definite; (2) It must be equal and fair; (3) The contract must be mutually obligatory; (4) It must not be tainted with fraud; (5) There must be no material mistake, misrepresentation nor misdescription (even though innocent) of the property sold under the contract; (6) The contract must be supported by adequate consideration; (7) The contract must be legal, binding the promisor to do only what he may lawfully do.¹

§ 1302. I. The Contract Must Be Certain and Definite.

Not only must the agreement, in order to confer an equitable title upon the vendee and to be specifically enforced, be *clearly proved*, but it must be *certain and definite in all its parts*.¹

Its terms must be so precise as to obviate any reasonable misunderstanding of its import; and if the terms be vague and uncertain, or the evidence to establish the contract be insufficient, a court of equity will decline to interpose in order to enforce it, and will leave the party to his legal remedy, if there be any.² Thus, a promise by a father, in consideration of the marriage of his daughter, to pay her "*a fortune*," not saying how much; and an agreement to buy land at a price to *be fixed afterwards*, but which was never fixed, and the vendor died, were justly held too vague to be enforced.³

1. See *Steadman v. Handy*, 102 Va. 385, 46 S. E. 380; *Augsburg Land Co. v. Pepper*, 95 Va. 94, 27 S. E. 807; *Clinchfield Coal Co. v. Powers*, 107 Va. 393, 59 S. E. 370.

1. 2 Min. Insts. 870; *Fry, Spec. Perform.*, § 203, et seq.; *Buxton v. Lister*, 3 Atk. 386; *Walpole v. Oxford*, 3 Ves. Jr. 420; *Pennybacker v. Maupin*, 96 Va. 461, 31 S. E. 607; *Venable v. Stamper*, 102 Va. 30, 45 S. E. 738.

2. 2 Min. Insts. 870; 2 Lom. Dig. 71; *Anthony v. Leftwich*, 3 Rand. (Va.) 245; *Pigg v. Corder*, 12 Leigh (Va.) 69; *Berry v. Wortham*, 96 Va. 87, 30 S. E. 443; *Clinchfield Coal Co. v. Powers*, 107 Va. 393, 59 S. E. 370.

3. 2 Min. Insts. 870; *Graham v. Call*, 5 Munf. (Va.) 396; *Colson v. Thompson*, 2 Wheat. 336.

But here, as in other cases, that is certain which is *capable of being made certain*, and therefore an agreement to sell at a *fair valuation*, or upon terms to be *adjusted by chosen friends*, who make the adjustment accordingly, will be enforced.⁴ But if no award be made by the friends selected, the court will not compel either party to submit to any other adjustment, and the agreement cannot be enforced.⁵

§ 1303. II. The Contract Must Be Equal and Fair.

It is in respect to this matter particularly that the *discretion* of a court of equity is exercised. That court will not call forth its extraordinary jurisdiction in order to enforce an agreement which, for any cause, it is unjust or unreasonable in point of conscience to enforce.¹

And it is generally agreed that such equality and fairness does not exist, if the agreement is liable to any of the following objections, viz: (1) Want of mutuality; (2) Any taint of fraud; (3) Any mistake, misrepresentation or misdescription (though innocent) of the estate sold, going to the value of the *whole* property; (4) Want of an adequate consideration; (5) Illegality of the contract, binding the party to do what he may not lawfully do;² all of which will be considered in the sections following.

§ 1304. III. The Contract Must Be Mutually Obligatory.

Mutuality of *obligation* is so essential a feature in all contracts, both at law and in equity, that without it there is no contract at

4. 2 Min. Insts. 870, 871; 2 Lom. Dig. 72; *Boyd v. Magruder*, 2 Rob. (Va.) 761.

5. 2 Min. Insts. 871; *Smallwood v. Mercer*, 1 Wash. (Va.) 290; *Dandridge v. Harris*, 1 Wash. 326, 1 Am. Dec. 465; *Jones v. Hubbard*, 6 Munf. (Va.) 261.

1. 2 Min. Insts. 871; *Clinchfield Coal Co. v. Powers*, 107 Va. 293, 59 S. E. 370; *Augsburg Land Co. v. Pepper*, 95 Va. 92, 27 S. E. 807; *Steadman v. Handy*, 102 Va. 382, 46 S. E. 380; *Pennybacker v. Maupin*, 96 Va. 461, 31 S. E. 607; *Southern R. Co. v. Franklin, etc.*, R. Co., 96 Va. 708, 709, 44 L. R. A. 297, 32 S. E. 485.

2. 2 Min. Insts. 871; and cases cited *supra*, note 1.

all. A married woman's contract is no more binding upon the opposite party than upon herself; and so where an infant's contract is *void*, it is void as to both parties, the adult no less than the infant.¹

But mutuality of *remedy* is not invariably insisted on in the courts of law, as, for example, in the case of infant's *voidable* contracts, where the privilege of renouncing them belongs to the infant only, and the adult is bound. It is said that a court of equity will not decree specific execution in *favor of an infant* generally, because the infant may, on his side, repudiate the contract if *he please*.² But it is submitted that this seems to involve an unnecessary departure from the general principles regulating infant's contracts, hardly justified by the *discretion* which equity professes to exercise in cases of specific performance; especially when it is considered that where the infant files his bill after age, he thereby solemnly confirms the contract, and thus establishes its mutuality.³

A parallel case is where a person who has signed a contract in writing is compelled to perform it, whilst he could not oblige the other party who has not signed it to do the same thing. Lord Redesdale deemed this case also one where mutuality of remedy was wanting, and consequently that no decree for specific execution could be made.⁴ His opinion, however, has been overruled, both in England and in America, partly from the consideration that the law, from motives of policy, has created a diversity between the parties, prohibiting the enforcement in one case and not in the other; and partly because the other party,

1. 2 Min. Insts. 871; *Cummins v. Beavers*, 103 Va. 230, 106 Am. St. Rep. 881, 48 S. E. 891; *American Agricultural Co. v. Kennedy*, 103 Va. 171, 48 S. E. 868; *Pennybacker v. Maupin*, 96 Va. 463, 31 S. E. 607; *Graybill v. Brugh*, 89 Va. 895, 37 Am. St. Rep. 894, 21 L. R. A. 133.

2. 2 Min. Insts. 871; 2 Lom. Dig. 75; 1 Sugden, Vendors, 335; *Flight v. Ballard*, 4 Russ. 298.

3. 2 Min. Insts. 872. See *Goddin v. Vaughan*, 14 Gratt. (Va.) 102.

4. 2 Min. Insts. 872; *Lawrence v. Butler*, 1 Sch. & Lefr. 13, 19. See *Wood v. Dickey*, 90 Va. 160, 17 S. E. 818.

by asking for performance, has in writing ratified the contract, and so established a mutuality of remedy.⁵

So also, a purchaser is enabled to sue for specific performance against the *vendor's heirs*, or against a *woman* who, since the contract was made, has *married*, or against a person who, since the contract, has become *insane*, if he is willing to take such title as the parties on the other side can respectively convey; whilst the contract cannot be enforced on that other side as against the purchaser.⁶

And lastly, where one party has committed a *fraud* upon the other, this latter may enforce the contract, if he pleases, against the former, whilst he who has committed the fraud can have no mutual remedy against the innocent party.⁷

These several instances seem to establish that it is not every want of mutuality of *remedy* which will induce a court of equity to abstain from exercising its authority in decreeing performance; and that the court does not deny its aid where, the contract being *not void*, but *voidable only*, the policy of the law has created a *diversity* between the parties, allowing one the option of insisting on the contract or not, while it permits no such choice to the other.⁸

It is sufficient, if there be mutuality of remedy at the time the contract is *entered into*, and if, by a *subsequent contingency*, that mutuality is destroyed, it is in general no barrier to a decree for specific performance on the side of the party not affected by the contingency. Thus, when a vendor covenants for himself, but *not naming his heirs*, to convey with good title (which, of course, binds him to convey with his own general warranty), and he dies before conveyance, whereby such general warranty becomes impossible, it is held that the vendor's heirs are thereby precluded from demanding specific performance against the pur-

5. 2 Min. Insts. 872; *Seton v. Slade*, 7 Ves. 275; *Central Land Co. v. Johnston*, 95 Va. 223, 28 S. E. 175.

6. 2 Min. Insts. 869, 872.

7. 2 Min. Insts. 872.

8. 2 Min. Insts. 872.

chaser; but that the purchaser might, notwithstanding, require it of them.⁹

It is this principle of *mutuality* which enables a *vendor* to compel *in equity* the fulfillment of the contract on the part of the purchaser, by a decree for the payment of the purchase money, although it might often be as well accomplished by an *action at law*; for equity, having assumed jurisdiction in order to compel the *vendor* to perform the contract, found itself constrained by its own principle of mutuality to take cognizance of the case where the purchaser refused to fulfill the agreement, and the application was on the part of the vendor;¹⁰ a cognizance which has even been extended to an assignee for value of a bond given for the purchase money of land, and been allowed to embrace at once the assignor and the vendee.¹¹

§ 1305. IV. The Contract Must Not Be Tainted with Fraud.

Fraud, whether it be effected by actual misrepresentation or by diligent concealment, which are alike condemned, is an insuperable objection in a court of equity to decreeing specific performance of a contract on the side of that party who was guilty of the fraud, or to vesting in him the *equitable title* to the land under the contract. But there is a marked distinction between the degree of deception which will lead to a *denial of specific performance*, and the much grosser fraud which is requisite in order to induce the court to *rescind* the contract.¹

Nay, further, it requires much less strength of case on the part of the *defendant* to resist a bill to perform a contract than

9. 2 Min. Insts. 872, 873; *Stapilton v. Stapilton*, 1 Atk. 110; *Moore v. Randolph*, 6 Leigh (Va.) 186, 29 Am. Dec. 208.

10. 2 Min. Insts. 873; 2 Lom. Dig. 76.

11. 2 Min. Insts. 873; *Hanna v. Wilson*, 3 Gratt. (Va.) 243, 46 Am. Dec. 190.

1. 2 Min. Insts. 873; 2 Lom. Dig. 76; *Fry, Spec. Perform.*, § 233, et seq.; *Gibbons v. Jackson*, 10 Leigh (Va.) 364; *Rossett v. Fisher*, 11 Gratt. (Va.) 492; *Ratliff v. Vandikes*, 89 Va. 307, 15 S. E. 864. See *Rison v. Newberry*, 90 Va. 513, 18 S. E. 916.

it does on the part of the *plaintiff to maintain* a bill to enforce a specific performance; for, in the latter case, the agreement must be certain, fair and just in all its parts.²

Fraud, of course, may assume an infinite variety of shapes; and whilst sometimes palpable and gross, it may in other instances have only a barely discernible flavor of deception and wrongful advantage. Thus, an agreement having been made for an estate lying on the Thames, which was represented to be worth £90 a year *net*, upon a bill by the *vendor* to enforce specific performance against the purchaser, it appeared that there had been an industrious *concealment* of the fact that there was an annual expenditure of £50 required upon the needful repairs of a wall to keep out the river; and thereupon the bill was dismissed, but *without costs*.³

So, it having been agreed to assign a lease of a tenement in Petersburg, Va., without acquainting the assignee with a stipulation in the lease, that if the premises should be destroyed by fire, lightning, or tempest, the *term should cease*, but the rent be paid up to the time of such destruction; and the premises having been the very next day, and the day before the assignee was to have been put in possession, consumed by a memorable conflagration which laid a considerable part of the town in ruins, upon a bill filed by the *purchaser* he was relieved from the agreement, and certain negotiable notes which he had executed for the purchase money of the lease were decreed to be given up to be cancelled.⁴

The employment, *privately*, of puffers at an auction tends to

2. 2 Min. Insts. 873; 2 Story, Eq. Jur., § 769; Grimes v. Sanders, 93 U. S. 55; Graham v. Pancoast, 30 Penn. St. 89; Stearns v. Beckham, 31 Gratt. (Va.) 417.

3. Shirley v. Stratton, 1 Bro. Ch. 440; 2 Min. Insts. 874.

4. Snelson v. Franklin, 6 Munf. (Va.) 210; McNiel v. Baird, 6 Munf. 316; 2 Min. Insts. 874. So, where a party has made a contract in ignorance or misapprehension, arising from the declarations and conduct of the other contracting party during the negotiation, the contract will not be enforced on that side. Gibbons v. Jackson, 10 Leigh (Va.) 364.

(1440)

operate as a fraud upon *bona fide* bidders, who may be, and generally are, thereby led to give more for the property than otherwise they would have done. This doctrine, however, does not prevent the seller from reserving *publicly* a right to make *one bid*, in order to prevent a sacrifice of his property.⁵

And so, upon a like principle, where a sale is advertised to be *without reserve*, it is a fraud upon the purchaser for the seller, by his own act or by collusion with others, so to interpose as to enhance the price.⁶

On the other hand, for parties to agree not to bid the one against the other at an auction, or that one should bid for the benefit of himself and others, or by any device to contrive that there shall not be a free competition at a sale, is a fraud on the vendor, contrary to public policy, and invalidates any contract of purchase made under the influence of the arrangement.⁷

The purchaser who has been deceived by the misrepresentation or other fraud of the vendor must repudiate the transaction as soon as he becomes cognizant of the deceit. If he omits to do so, and continues in possession, speculating upon the chance of at length getting a satisfactory title, he is presumed to have meant to waive his right to annul the bargain, or to have made a new one, and will be compelled to proceed with the contract; but he may still claim an abatement of the purchase money, so far as the title proves defective; nor is he bound in any case to accept, in lieu of such abatement, any *indemnity* whatsoever.⁸

5. 2 Min. Insts. 880; 1 Story, Eq. Jur., § 293; *Baxwell v. Christie*, Cowp. 496; *Howard v. Castle*, 6 T. R. 644; *Bramley v. Alt*, 3 Ves. Jr. 623; *Rex v. Marsh*, 2 Yo. & Jew. 332; *Thornett v. Haynes*, 15 Mees. & W. 371; *Veazie v. Williams*, 8 How. 153, et seq.; *Slater v. Maxwell*, 6 Wall. 276; *Cocks v. Izard*, 7 Wall. 561; *Barnes v. Morrison*, 97 Va. 372, 34 S. E. 93, 5 Va. Law Reg. 414.

6. 2 Min. Insts. 880, 881; *Meadows v. Tanner*, 5 Madd. 31.

7. 2 Min. Insts. 881; *Barnes v. Morrison*, 97 Va. 372, 34 S. E. 93, 5 Va. Law Reg. 414; *Jones v. Caswell*, 3 Johns. (N. Y.) 29; *Doolin v. Ward*, 6 Johns. 194; *Thompson v. Davies*, 13 Johns. 112; *Slater v. Maxwell*, 6 Wall. 276; *Cocks v. Izard*, 7 Wall. 567.

8. 2 Min. Insts. 874; *Pollard v. Rogers*, 4 Call (Va.) 239; *Goddin v. Vaughan*, 14 Gratt. (Va.) 124, et seq.

The party who calls for specific performance of a contract, or relies upon an equitable title arising thereunder, must be able to show that his conduct has been clean, honorable and fair. It is a principle of equity that the court must be satisfied as to the integrity and good faith of the party seeking its interference. And hence there are few cases which require more the exercise of a sound and reasonable judicial discretion than the cases of such applications; where the court must indeed govern itself, as far as it may, by general rules and principles, but must at the same time grant or withhold relief when these rules and principles fail to furnish an exact measure of justice between the parties, according to the circumstances of each particular case.⁹

§ 1306. V. There Must Be No Material Mistake, Misrepresentation nor Misdescription (though Innocent) of the Property Sold under the Contract.

The supposition here is that there has been *no fraudulent intent* (which would belong to the preceding head), but only a want of due care or knowledge on the part of the vendor in describing or representing the property. And it is assumed, also, that the misrepresentation or misdescription goes to the whole estate, or at least to so material a part of it that the purchaser's views and objects in his purchase are either frustrated or essentially impaired, and that the mistake was unknown to him. These circumstances will occasion a court of equity to decline to enforce the contract.¹

The remedy *at law*, in such a case, would frequently be arrested, although the misdescription were comparatively trivial, by the necessity that the vendor, in an action at law, should aver in his declaration, and should prove at the trial, a performance on his part of the contract as it was made, which, of course, he

9. 2 Min. Insts. 874, 875; 2 Story, Eq. Jur., §§ 742, 693; Kerr, *Fraud & Mistake*, 357; *King v. Hamilton*, 4 Pet. 311; *Willard v. Taylor*, 8 Wall. 557; *Miss. & Mo. R. R. Co. v. Cromwell*, 91 U. S. 643; *Stearns v. Beckham*, 31 Gratt. (Va.) 388, 389.

1. 2 Min. Insts. 875, 876; 2 Lom. Dig. 79; Fry, *Spec. Perform.*, § 425, et seq.; *Rogers v. Pattie*, 96 Va. 498, 31 S. E. 897. (1442)

cannot do if the contract contains a misrepresentation touching the subject matter. On the other hand, the purchaser, upon the vendor's default, may abandon the contract, and recover whatever money he has paid or deposited on account of it. *In equity*, however, if the purchaser can get *substantially* what he contracted for, the agreement is generally enforced at the suit of the vendor, and always at the suit of the purchaser, allowing in either case compensation for deficiencies in quantity.²

A vendor, in the absence of any stipulation to the contrary, is always bound to make a *good title*, free from incumbrance of every description which may embarrass the full and quiet enjoyment of the premises by the purchaser;³ and supposing the vendor thus bound, either impliedly or by express agreement, the purchaser is not obliged, and will not be required, to accept any other or inferior title, even though he knew at the time of the contract that the vendor's title was defective.⁴

On the other hand, if the vendor does not affect to have a perfect title, and expressly sells only such as he has, without warranty, he is entitled to specific performance without being required, as a preliminary, to show or to convey a clear title.⁵

2. 2 Min. Insts. 876; 2 Lom. Dig. 79; *Evans v. Kingsberry*, 2 Rand. (Va.) 131, 14 Am. Dec. 779; *Jackson v. Ligon*, 3 Leigh (Va.) 161; *McKee v. Barley*, 11 Gratt. (Va.) 340.

3. 2 Min. Insts. 876; *Garnett v. Macon*, 6 Call (Va.) 309, 367; *Christian v. Cabell*, 22 Gratt. (Va.) 102; *McAllister v. Harman*, 101 Va. 17, 42 S. E. 920; *Dunn v. Stowers*, 104 Va. 290, 51 S. E. 366. See *Hudson v. Max Meadows L. & I. Co.*, 97 Va. 341, 33 S. E. 586.

4. 2 Min. Insts. 876; *Jackson v. Ligon*, 3 Leigh (Va.) 186; *Goddin v. Vaughn*, 14 Gratt. (Va.) 117, 124; *Griffin v. Cunningham*, 19 Gratt. 571. But if, after becoming aware of the defect of title, he does not forthwith abandon the contract, he is understood thereby to waive the objection, and to consent to take such title as the vendor can make. 2 Min. Insts. 876; *Daniel v. Leitch*, 13 Gratt. 195, 212; *Goddin v. Vaughn*, 14 Gratt. 124, et seq.; *Christian v. Cabell*, 22 Gratt. 99.

5. 2 Min. Insts. 876; *Bailey v. James*, 11 Gratt. (Va.) 468, 62 Am. Dec. 659; *Goddin v. Vaughn*, 14 Gratt. 124, 125; *Vail v. Nelson*, 4 Rand. (Va.) 478, 481; *Sutton v. Sutton*, 7 Gratt. 234, 56 Am. Dec. 109.

§ 1307. Same—Mistake as to Quantity of Interest Transferred.

In respect to the *quantity* of interest, equity will not compel specific performance where the vendor is not possessed of as large an interest as he has contracted to convey. Thus, if the estate is described as a *feehold*, the purchaser will not be compelled to take a *leasehold*, however long the term; nor, if he contracts for a *lease*, will be required to take an *underlease*, nor a shorter term instead of a considerably longer one; although any slight deficiency in any of these cases may be made up by compensation.¹

It is expedient here to call the student's attention again to the principle, that when, in consequence of the title failing as to too considerable a part of the property to be the subject of *compensation*, the *vendor* is unable to compel performance of the contract, the *vendee* may yet compel it on his side, if he is willing to take so much as the vendor can convey. Thus, where two parcels of land are embraced in the contract, each as a specific price, and the vendor proves unable to make a valid title to but one, whilst he is in consequence precluded from enforcing performance against the purchaser, the purchaser, on his side, if he thinks fit, may take the parcel to which a good title can be made, and compel the vendor to convey it to him.²

So, where a wife and two other joint owners of land, together with the wife's husband, contracted to convey the land, it was determined that, whilst the husband and wife could not be compelled to perform the contract, nor the husband to convey his interest, and so the purchaser could not have been compelled to take the land specifically, yet the purchaser might compel the other two joint owners to convey their respective portions, the purchase money being abated in proportion.³

§ 1308. Same—Mistake or Misdescription as to Quantity of Land Transferred

The most frequent case of misdescription is as to the *quantity*

1. 2 Min. Insts. 877; 2 Lom. Dig. 81.

2. *White v. Dobson*, 17 Gratt. (Va.) 262; 2 Min. Insts. 877.

3. *Clarke v. Reins*, 12 Gratt. (Va.) 98; 2 Min. Insts. 877.

of the land; in respect to which the doctrine depends on whether the contract is: (1) For an estimated quantity; (2) For a specified number of acres; or (3) For a tract or parcel in gross.¹

(1) Where the contract is for an *estimated quantity*, as for a tract of land containing, *by estimation*, one hundred acres, be the same *more or less*, an acre or two in the one hundred acres, more or less, would be no ground for *denying specific* performance, nor ground even for *compensation*. But if the deficiency be very considerable, as one-third, or even *one-sixteenth*, where the land is of much value, the words "*more or less*," or even a stipulation that the parties should not be liable respectively for an excess or a deficiency, will not preclude the purchaser from resisting the vendor's application for specific performance; and if the vendor *knew the true quantity*, although he may, perhaps, compel the purchaser to take the land, the latter is, at all events, entitled to an abatement of the purchase money, even, it seems, for a small difference.²

(2) Where the contract is for a *specified number of acres*, at a named price per acre (as for a tract of five thousand one hundred and thirty acres, more or less, at thirty shillings per acre), the parties are construed to have reference to the supposed quantity, and if there prove to be an excess or deficiency greater than can be imputed to variation in instruments and small errors in surveys (say from one to two acres in the hundred), compensation is to be made by abating or increasing the purchase money, according as there is a deficiency or excess.³

1. 2 Min. Insts. 877. See *Berry v. Fishburne*, 104 Va. 460, et seq., 51 S. E. 827; *Benson v. Humphreys*, 75 Va. 196; *Trinkle v. Jackson*, 86 Va. 238, 9 S. E. 986, 4 L. R. A. 525; *Boschens v. Jurgens*, 92 Va. 756, 24 S. E. 390; *Hull v. Watts*, 95 Va. 10, 27 S. E. 829; *Watson v. Hoy*, 28 Gratt. (Va.) 698.

2. 2 Min. Insts. 877, 878; 2 Lom. Dig. 82, 83; *Triplett v. Allen*, 28 Gratt. (Va.) 722, 21 Am. Rep. 320; *Berry v. Fishburne*, 104 Va. 460, et seq., 51 S. E. 827; *Benson v. Humphreys*, 75 Va. 196. See *Emerson v. Stratton*, 107 Va. 303, 58 S. E. 577.

3. 2 Min. Insts. 878; *Jolliffe v. Hite*, 1 Call. (Va.) 301, 1 Am. Dec. 519; *Nelson v. Carrington*, 4 Munf. (Va.) 332, 6 Am. Dec. 519; *Nelson v. Matthews*, 2 Hen. & M. (Va.) 164, 3 Am. Dec. 620; *Keyton v.* (1445)

(3) Where the contract is for a tract or parcel of land *in gross*, without reference to its quantity.

Whatever the deficiency or excess in this case, specific performance is to be decreed, without allowance therefor, to either party.⁴ But the question whether a sale *in gross* or a sale *by the acre* was designed is often a perplexing one, as questions of *intention* generally are. The inclination of the courts is to construe all sales as made *by the acre*, because that is the fairest and most equal mode of adjustment, and avoids the element of *hazard*, which is depreciated; so that if a contract *in gross*, or of *hazard*, as to the quantity, is alleged, it must be made apparent by the terms of the contract, interpreted in the light of surrounding circumstances.⁵

Brawford, 5 Leigh (Va.) 39; Weaver v. Carter, 10 Leigh 37; Neal v. Logan, 1 Gratt. (Va.) 14; Jones v. Tatum, 19 Gratt. 735; Caldwell v. Craig, 21 Gratt. 137, et seq.; Benson v. Humphreys, 75 Va. 196; Berry v. Fishburne, 104 Va. 460, et seq., 51 S. E. 827; Emerson v. Stratton, 107 Va. 303, 58 S. E. 577. It follows as a corollary from the construction assigned to such contracts (namely, that they are supposed to refer to the *actual quantity* of land), that there is a *right of survey* on both sides, which, if no particular time be limited for its exercise, continues until the whole business is closed. Nelson v. Carrington, *supra*; Carter v. Campbell, Gilm. (Va.) 170; Crawford v. McDaniel, 1 Rob. (Va.) 448; Neal v. Logan, *supra*. On the other hand, that a right to survey the land is expressly reserved or, if not reserved, is claimed by one party and acquiesced in by the other, is justly considered as strong, and generally satisfactory, evidence that a sale *by the acre*, and *not in gross*, was contemplated. Nelson v. Carrington, *supra*; Bierne v. Erskine, 5 Leigh 59.

4. 2 Min. Insts. 878; Keyton v. Brawford, 5 Leigh (Va.) 39; Jolliffe v. Hite, 1 Call (Va.) 301, 1 Am. Dec. 519; Tucker v. Cocke, 5 Rand. (Va.) 51; Caldwell v. Craig, 21 Gratt. (Va.) 132; Benson v. Humphreys, 75 Va. 196; Berry v. Fishburne, 104 Va. 460, et seq., 51 S. E. 827.

5. 2 Min. Insts. 878, 879; Blessing v. Beatty, 1 Rob. (Va.) 287; Crawford v. McDaniel, 1 Rob. 448; Quesnel v. Woodlief, 6 Call (Va.) 238; Watson v. Hoy, 28 Gratt. (Va.) 698; Benson v. Humphreys, 75 Va. 196; Boschen v. Jurgens, 92 Va. 756, 24 S. E. 390; Hull v. Watts, 95 Va. 10, 27 S. E. 829; Berry v. Fishburne, 104 Va. 460, 51 S. E. 827; Emerson v. Stratton, 107 Va. 303, 58 S. E. 577. Thus, where the terms (1446)

In *Benson v. Humphreys*,⁶ the principles governing the effect of mistakes or misdescriptions in contracts touching land are thus summarized:

"First. Every sale of real estate, where the quantity is referred to in the contract, and when the language of the contract does not *plainly* indicate that the sale was intended to be a sale *in gross*, must be presumed to be a sale *per acre*.

"Second. The language, 'more or less,' used in contracts for the sale of land, must be understood to apply only to small excesses or deficiencies, attributable to variations of instruments of surveyors, etc. When these terms are used it rather repels the idea of a contract of *hazard*, and implies that there is no considerable difference in quantity.

of the agreement were for the sale of "*a certain tract of land known by the name of Crab-bottom, said to contain 870 acres, be it more or less, etc., to wit, all that tract left him (the vendor) by his father,*" it was considered to be a sale *in gross*, and not by the acre. *Hull v. Cunningham*, 1 Munf. (Va.) 330. So an agreement to sell "1,100 acres of land, more or less, to the vendee, adjoining the vendee's land, for the sum of £330," was determined to be a sale *in gross*. *Pendleton v. Stewart*, 5 Call (Va.) 1, 2 Am. Dec. 583. So it also is when the contract is expressly for certain *metes and bounds*, *Grantland v. Wight*, 2 Munf. 179; *Foley v. McKeown*, 4 Leigh (Va.) 627; *Seamonds v. McGinnis*, 3 Gratt. (Va.) 319; and where the agreement is for a *tract of land*, "bounded as expressed in the survey made by C. K., and estimated by the said C. K. at 1,022¾ acres," although the purchase money was an equi-multiple of the number of acres. *Weaver v. Carter*, 10 Leigh 37. See *Russell v. Keeran*, 8 Leigh 9; *Jones v. Tatum*, 19 Gratt. 735; *Caldwell v. Craig*, 21 Gratt. 137, et seq. It is regarded as a circumstance tending to indicate a sale to be *by the acre* that the purchase money is an equi-multiple of the number of acres, *Jolliffe v. Hite*, 1 Call 324, 1 Am. Dec. 519; *Quesnel v. Woodlief*, *supra*; *Keyton v. Brawford*, 5 Leigh 49; yet it did not prevail over other circumstances in *Weaver v. Carter*, *supra*; and the converse, although persuasive, is perhaps still less conclusive, namely, that the sale is *in gross* because the purchase money is *not an equi-multiple* of the number of acres. *Blessing v. Beatty*, 1 Rob. 287; *Crawford v. McDaniel*, 1 Rob. 448. See *Emerson v. Stratton*, 107 Va. 303, 58 S. E. 577.

6. 75 Va. 196. See, also, *Berry v. Fishburne*, 104 Va. 460, 51 S. E. 827.

(1447)

"Third. While contracts of *hazard* are not *invalid*, courts of equity do not regard them with favor. The presumption is against them, and while such presumption may be repelled, it can only be effectually done by clear and cogent proof.

"Fourth. The burden of proof is always upon the party asserting a contract of hazard; for the presumption always being in favor of a sale per acre, a sale in gross or contract of hazard must be clearly established by the facts.

"Fifth. Where the parties contract for the payment of a *gross sum* for a tract or parcel of land upon the estimate of a given quantity, the presumption is that the quantity influences the price to be paid, and that the agreement is not one of hazard.

"Sixth. Whether it be a contract in gross or for a specific quantity depends, of course, upon the intention of the contracting parties, to be gathered from the terms of the contract and all the facts and circumstances connected with it. But in interpreting such contracts, the courts, not favoring contracts of hazard, will always construe the same to be contracts of sale *per acre*, whenever it does not *clearly appear* that the land was sold *by the tract*, and not by the acre."

In conclusion of this branch of the subject, it may be observed that, even if the sale were by the acre, if the purchaser agree to take it *by previous surveys*, without any fraud, misrepresentation, or concealment by the vendor, he takes upon himself the risk of deficiency in quantity, and is entitled to no abatement of price, if there be such deficiency.⁷

§ 1309. Same—Mistake or Misdescription in Other Respects.

While misdescription in point of *quantity* is the most frequent, it is by no means the only misdescription which occurs in practice. If the premises are described as possessed of any special advantage which they do not possess, the purchaser will be entitled to compensation, if in the nature of things the disappoint-

7. 2 Min. Insts. 879; *Fleet v. Hawkins*, 6 Munf. (Va.) 188; *Tucker v. Cocke*, 2 Rand. (Va.) 57. (1448)

ment be susceptible of compensation or, if not, to a rescission of the contract.¹

Thus, if the land be represented to be in close proximity to a town, and turns out to be three or four miles off; or if a house wanted *immediately* as a residence, be represented to be in repair when it is uninhabitable, there being no principle in either case on which *compensation* can be estimated, the only relief which can be administered is to *rescind the contract*. But if, in the latter case, the house were not immediately required for use, compensation could be easily made, and would be decreed accordingly, viz.: the *cost of the repairs*.²

Where, however, the purchaser *knows* the description to be false, or it is so patent and obvious that it could not have escaped his observation, he cannot pretend to have been deceived, and may not, on that ground, resist the specific performance of the agreement.³

§ 1310. VI. The Contract Must Be Supported by Adequate Consideration—1. In General.

Without an actual *valuable*, or at least *meritorious*, consideration, equity will never interpose to decree specific performance of a contract for the sale or lease of lands; but under the Virginia statute of Parol Agreements, it is not necessary that the consideration be set forth or expressed in the written contract, and it may be proved (where a consideration is necessary) by other evidence.¹

Where the contract is *under seal*, the seal imports at law a valuable consideration; but the jurisdiction in the courts of equity to compel the performance of agreements being one which it is *discretionary* with them to exercise, they pay no regard in such cases to that implication, but require proof of an *actual*

1. 2 Min. Insts. 880.

2. 2 Min. Insts. 880; 2 Lom. Dig. 88, 89.

3. 2 Min. Insts. 880; 2 Lom. Dig. 88, 89.

1. Va. Code, 1904, § 2840; 2 Min. Insts. 882.

consideration, valuable or meritorious, in order to call forth their interposition.²

Thus, if one should enter into a *voluntary* agreement, whether under seal or not, to transfer stock to another, or to convey to him certain real estate, a court of equity would not enforce the agreement, either against the party who made it, or against his representatives, for the complainant is a mere *volunteer*. The same rule is applied to imperfect *gifts inter vivos* (not by *will*), to imperfect voluntary assignments of debts and other property, to voluntary executory trusts, and to voluntary defective conveyances.³

§ 1311. Same—2. Meritorious Consideration.

The provision for children by parents, or for a wife by her husband, constitutes one of the most frequent instances of a *meritorious* consideration, which, though not valuable, is yet deemed sufficient to call forth the powers of a court of equity, at least to aid a defective conveyance, or exercise of a power of appointment.¹

Thus, in *Ward v. Webber*,² legal defects in a prior voluntary gift by a parent to a young child, otherwise unprovided for, were supplied against a *subsequent voluntary donee*; and in *Beard v. Nuthall*,³ an agreement in favor of a wife, though made after marriage, was carried into effect as against the *husband*, although of course such gifts can never avail against the donor's *creditors*.⁴

2. 2 Min. Insts. 882; 2 Lom. Dig. 90.

3. 2 Min. Insts. 882; 2 Story, Eq. Jur., § 793a; *Colman v. Sarel*, 3 Bro. Ch. 22, 14 and notes, 1 Ves. Jr. 55, 56, n. 2; *Willan v. Willan*, 16 Ves. 82; *Antrobus v. Smith*, 12 Ves. 45, et seq.; *Curtis v. Perry*, 6 Ves. 739; *Pennybacker v. Maupin*, 96 Va. 461, 31 S. E. 607. So, also, in the case of a voluntary defective exercise of a power of appointment. Post, § 1338, note 3.

1. 2 Min. Insts. 882; 2 Story, Eq. Jur., §§ 8, 793b, 987; *Husband v. Pollard*, 2 P. Wms. 467; *King v. Cotton*, 2 P. Wms. 357; *Young v. Nash*, 3 Atk. 185; post, § 1338, note 4.

2. 1 Wash. (Va.) 279.

3. 1 Vern. 427.

4. 2 Min. Insts. 882.

But where the agreement is made with a son-in-law, by reason of the *affinity*, and the wife, the donor's daughter, dies before the conveyance is made, equity will not enforce the agreement, the inducing motive having ceased.⁵ And agreements to make provision for *collateral relations* do not come within this principle, and in general equity will not enforce them unless there is some other consideration besides.⁶

The case of *Reed v. Vannorsdale*⁷ affords a good illustration of this doctrine. A rich and childless man proposed to his brother, who was poor, with a large family, to forego his intention of going to the West and to settle upon a tract of land belonging to him, and near his residence, which he proposed to *give him*. Induced by this promise, the impoverished brother accepted the proposal, and took possession of the land, but incurred, it is said, *no loss or expense* in so doing; and the promisor having died without making a conveyance, it was determined, upon a bill filed against his heirs, that there was neither a valuable nor meritorious consideration, and that specific execution must be denied.

The student must observe, however, that even independently of statute there is a conflict of authority whether a *merely meritorious* consideration will in any case justify the interposition of the court to give effect to the transaction, even to aid a defective conveyance in favor of a wife or children, although the writer conceives that the weight of authority and of reason is in favor of such interposition in such cases.⁸

And in Virginia, as to *oral* agreements to convey land, the doctrine of *meritorious consideration*, as supporting such agreements, has been totally swept away by the statute, enacted in 1887, providing that no right to a conveyance shall accrue by

5. 2 Min. Insts. 882, 883; *Darlington v. McCoole*, 1 Leigh (Va.) 36; *Pigg v. Corder*, 12 Leigh 69.

6. 2 Min. Insts. 883; *Osgood v. Strode*, 2 P. Wms. 245; *Stephens v. Trueman*, 1 Ves. Sr. 73.

7. 2 Leigh (Va.) 569.

8. 2 Min. Insts. 883. See *Keffer v. Grayson*, 76 Va. 524, 44 Am. Rep. 171.

reason of a *gift* or a *promise of a gift* not in writing, even though such gift or promise be followed by possession thereunder and improvement of the land by the donee or those claiming under him.⁹

§ 1312. Same—3. Compromise of a Doubtful Right as a Consideration.

There are other considerations besides those in favor of a child or a wife which, hovering between valuable and meritorious, are deemed sufficient to induce the interposition of a court of equity. The most prominent of these is perhaps the *compromise of a doubtful right* (which is a valuable, rather than *merely meritorious*, consideration); nor does it prevent the enforcement of the agreement of compromise that it has subsequently appeared that the right is really on the other side.¹ But if the compromise was made in ignorance of important or material facts, and not upon the basis of facts *assumed to be doubtful*, the agreement founded upon it is not enforced, and the compromise itself even may be rescinded.²

Compromises whose design is to preserve the honor of a father and his family, and to avoid family disputes, are regarded with peculiar favor, and for the most part will be enforced according to their terms.³

In *Penn v. Lord Baltimore*,⁴ we have a noteworthy instance of the enforcement in equity, of an agreement for the compromise of rights and adjustment of boundaries, not touching *es-*

9. Va. Code, 1904, § 2413. See *Nicholas v. Nicholas*, 100 Va. 660, 42 S. E. 669, 866; ante, § 1295.

1. 2 Min. Insts. 883; 2 Lom. Dig. 91; *Penn v. Lord Baltimore*, 1 Ves. Sr. 444; *Moore v. Fitzwater*, 2 Rand. (Va.) 442, 444; *Zane v. Zane*, 6 Munf. (Va.) 406, 412; *Williams v. Lewis*, 5 Leigh (Va.) 686; *Luckett v. Luckett*, 10 Leigh 56; *Shugart v. Thompson*, 10 Leigh 434.

2. 2 Min. Insts. 883; 2 Lom. Dig. 92; *Ross v. McLaughlan*, 7 Gratt. (Va.) 86.

3. 2 Min. Insts. 884; 2 Lom. Dig. 92; *Stapilton v. Stapilton*, 1 Atk. 1; *Luckett v. Luckett*, 10 Leigh (Va.) 50.

4. 1 Ves. Sr. 444, 450.
(1452)

tates merely, but *provinces*. The agreement in that case was between the representatives of William Penn and of Lord Baltimore, relative to the boundary between Maryland and the "three lower counties," as what is now the State of Delaware (then belonging to Pennsylvania), was styled, and also for determining the northern limits of Delaware, and was ordered by Lord Chancellor Hardwicke to be carried specifically into effect.

§ 1313. Same—Consideration Valuable, but Inadequate.

As to *inadequacy of consideration*, the *rule* is that inadequacy of price in contracts for the purchase of interests *in possession* is not, *of itself*, a ground for refusing performance of a contract for the sale of lands, unless its grossness is such as to be demonstrative of fraud; that is, so strong and manifest as to shock the conscience and confound the judgment of any man of common sense.¹

Inadequacy in such contracts is only an ingredient in evidence tending to prove imposition or oppression. Hence, sales made fairly for Confederate currency during the late civil war, the money having been paid and the possession delivered, have been uniformly enforced against the vendor, without regard to the steady and rapid depreciation of that currency.²

But whilst mere inadequacy of consideration does not, *standing alone*, deter a court of equity from decreeing specific performance of a contract for the purchase of vested *interests*, that court is more scrupulous with respect to sales of expectant *interests*, such as the interests of heirs in the inheritance, during the life of the ancestor. In this latter class of cases, and also in cases where the parties stand in such a relation as to give

1. 2 Min. Insts. 884; 1 Story, Eq. Jur., § 246, et seq.; Fry, Spec. Perform., § 281, et seq.; Coles *v.* Trecothick, 9 Ves. 246; Hincksman *v.* Smith, 3 Russ. 435, n. (1); Hale *v.* Wilkinson, 21 Gratt. (Va.) 75; White *v.* McGannon, 29 Gratt. 515; Stearns *v.* Beckham, 31 Gratt. 390, 391.

2. 2 Min. Insts. 884; Ambrouse *v.* Keller, 22 Gratt. (Va.) 769; Talley *v.* Robinson, 22 Gratt. 888; Hale *v.* Wilkinson, 21 Gratt. 78; Thorington *v.* Smith, 8 Wall. 1.

one an influence over the other, the party purchasing the expectant interest, or possessing the influence, can obtain the aid of the court only by satisfactorily removing every, even the slightest, doubt, about the adequacy of the price and the fairness of the transaction.³

§ 1314. VII. The Contract Must Be Legal, Binding the Party to Do Only What He May Lawfully Do.

It is manifest that no court ought to permit itself so to trifle with the obligations due to the state and to society as to compel a person either to pay anything for the breach of an illegal contract, or to do specifically what is adverse to the policy of the law.¹

Thus, an agreement to have part of an estate, to be recovered by the agency and at the charges of the applicant for the aid of the court, being tainted with the offence of *champerty*, cannot be enforced in equity.² Nor can an agreement entered into in fraud of a power, or where the performance would be a breach of trust, or would produce a forfeiture.³

Upon similar reasoning, where the husband and wife have united in a contract to convey either his lands or hers, the wife not being legally bound by the contract; or where a parent or husband binds himself to obtain a conveyance of land from the child or wife; in none of these cases will the husband or parent be compelled specifically to obtain a conveyance from the wife or child, which the wife or child is unwilling to make; because for the court to attempt it would lead either to an illegal attempt at coercion on the part of the husband or parent, or to a cruel moral constraint upon the wife or child to do what is repugnant

3. 2 Min. Insts. 884, 885; 2 Lom. Dig. 93; *Peacock v. Evans*, 16 Ves. 517; *Hincksman v. Smith*, 3 Russ. 433, 435, n. (1); *George v. Richardson*, Gilm. (Va.) 230. See *Cribbins v. Markwood*, 13 Gratt. (Va.) 507, 67 Am. Dec. 775; *Hale v. Wilkinson*, 21 Gratt. 85, 86.

1. 2 Min. Insts. 885; 1 Story, Eq. Jur., § 259, et seq.; *Ex parte Dyster*, 1 Meriv. 172; *Coleman v. Turnpike Co.*, 49 Cal. 517.

2. *Powell v. Knowler*, 2 Atk. 227; 2 Min. Insts. 886.

3. 2 Min. Insts. 886. See post, § 1339.
(1454)

to their wishes in order to relieve the husband or parent from the durance imposed by the court for not obeying its order.⁴ The only recourse of the complainant, in such case, is to express his willingness to pay the full purchase money, and accept a deed without the wife's or child's signature, in which event specific performance may be decreed;⁵ or else to sue the husband or parent in a *court of law* to recover such damages for the breach of the agreement as a jury may allow.⁶

Nor is this doctrine in essence confined to the case of a husband or parent, though some reasons apply in those cases which are wanting in others. But it may be stated in general that in all applications for specific performance, it must appear that the defendant is not called upon to do what he is *not lawfully competent* to do, whereby he would either himself be exposed to an action for damages, on the part of some one injured by the act, or by conveying a title, even though unquestionably bad, might possibly expose a third person to be damnified by creating an adverse claim with which he may have to contend.⁷

It must be further observed, however, that if one having only partial interests in an estate chooses to represent it as his own, and to enter into a contract to sell it as his own, it is not competent for him afterwards to say that he has *not the entirety*, and therefore the purchaser shall not have the benefit of his contract as far as it is in his power to confer it. If the purchaser elects to *take as much as the vendor can convey*, he has a right to that, and to an abatement of the purchase money as to the

4. 2 Min. Insts. 886; 2 Story, Eq. Jur., § 732, et seq.; Emery v. Wase, 8 Ves. 514, et seq.; Mortlock v. Buller, 10 Ves. 305; Innis v. Jackson, 16 Ves. 367; Davis v. Jones, 1 Bos. & P. N. R. 267; Graybill v. Brugh, 89 Va. 895, 37 Am. St. Rep. 894, 21 L. R. A. 133; Dunsmore v. Lyle, 87 Va. 391, 12 S. E. 610. See Clarke v. Reins, 12 Gratt. (Va.) 98.

5. Graybill v. Brugh, 89 Va. 899, 37 Am. St. Rep. 894, 21 L. R. A. 133. See ante, § 318; Clarke v. Reins, 12 Gratt. (Va.) 98.

6. 2 Min. Insts. 886; 2 Story, Eq. Jur., § 734, n. (1); Emery v. Wase, 8 Ves. 514, 515.

7. 2 Min. Insts. 886; 2 Lom. Dig. 94; Harnett v. Yielding, 2 Sch. & Lefr. 554; McCann v. Janes, 1 Rob. (Va.) 261, note.

residue; and the court will give no heed to the objection coming from the vendor, that the purchaser cannot get all that he contracted for.⁸

Nor, on the other hand, is it allowable for the purchaser to compel the vendor thus to convey to him as much as he has, and can convey, and *also to proceed at law* to recover damages for that which he cannot convey; for it is a principle of courts of equity to make a full end of whatever litigation comes before them, and every decree of those courts is always in complete satisfaction of the claims of the parties touching the subject.⁹

The Virginia case of *Nelson v. Nelson*¹⁰ presents a remarkable question of the *legality* of an agreement, with reference to its being specifically enforced. It was the case of an agreement between *the children* of a family, in the *life-time of their father*, to divide his estate *equally* between them at his death, whatever distribution he might think proper to make of it by his will. The father by his will gave a very small and unequal portion of his property to his eldest son, who thereupon filed his bill against the other children to carry into effect the agreement in question. It was insisted in opposition to the application, that such an agreement is at war with social policy, tending to encourage irreverence for parents, and operating something like a fraud upon the decedent, by defeating that disposition of his property which he has a right to make, and which he has plainly declared; and that it ought not, therefore, to be countenanced in a court of equity. The court, however, whilst it declined to enforce the agreement in that instance, because it was insufficiently proved, yet expressed the opinion that such arrangements might under circumstances tend to promote the peace of families, and be free from reasonable objection, and could not with propriety

8. 2 Min. Insts. 886; *Mortlock v. Buller*, 10 Ves. 316; *Mestaer v. Gillespie*, 11 Ves. 640; *Milligan v. Cooke*, 16 Ves. 1; *Todd v. Gee*, 17 Ves. 274; *Wood v. Griffith*, 1 Swanst. 54.

9. 2 Min. Insts. 887; *McCann v. Janes*, 1 Rob. (Va.) 260, 262, note.

10. 1 Wash. (Va.) 136. See *Headrick v. McDowell*, 102 Va. 124, 102 Am. St. Rep. 843, 65 L. R. A. 578; *Mort v. Jones*, 105 Va. 670, 51 S. E. 220, 54 S. E. 857.

(1456)

be denounced as inherently and invariably vicious and inadmissible.¹¹

§ 1315. Discharge by Parol of a Written Contract to Convey Land.

A written agreement for the sale or lease of lands, under the statute, supposing it to be not under seal, and perhaps, if it is, may be *discharged verbally*, such subsequent verbal agreement operating to *repel the plaintiff's equity* to enforce the written contract.¹

11. Indeed, the general principle that an agreement of this character between children in their father's lifetime, notwithstanding it might tend to frustrate the scheme of his *testamentary dispositions*, is not intrinsically *contra bonos mores*, and if duly proved might be enforced specifically in equity, was recognized and approved in *Lewis v. Madisons*, 1 Munf. (Va.) 803. And a similar doctrine is established in *Wethered v. Wethered*, 2 Sim. 191; *Harwood v. Tooke*, 2 Sim. 192; *Hyde v. White*, 5 Sim. 524. But in Virginia contracts between *heir and ancestor* by which the operation of the statute of *Descents* is to be defeated are void, as contrary to public policy. *Headrick v. McDowell*, 102 Va. 124, 102 Am. St. Rep. 843, 65 L. R. A. 578; *Mort v. Jones*, 105 Va. 670, 51 S. E. 220, 54 S. E. 857.

1. 2 Min. Insts. 859, 860; *Gorman v. Salisbury*, 1 Vern. 240; *Legal v. Miller*, 2 Ves. Sr. 299, 376. But such written agreement cannot be *altered* or *contradicted* in particular parts, by parol evidence, for that would be in conflict with the statute, making what the statute requires to be altogether in writing to depend, in part, on verbal evidence. 2 Min. Insts. 860; 2 Lom. Dig. 47; *Vance v. Walker*, 3 Hen. & M. (Va.) 288; *Wilson v. Spencer*, 11 Leigh (Va.) 261.

But it must be remembered, that the doctrine which forbids that a written contract shall be contradicted by parol evidence, does not extend to prevent proof of a mistake or fraud, whereby the writing has been made to hold different language than was intended by the party. A court of equity has always jurisdiction to rectify such mistake or fraud upon *clear proof* of its existence, and to reform the contract according to the true intent and purpose of the parties. 2 Min. Insts. 860; *Pullen v. Mullen*, 12 Leigh 434; *Alexander v. Newton*, 2 Gratt. (Va.) 266; *Shepherd v. Henderson*, 3 Gratt. 367.

It may also be remarked that, as a general rule, the time for the performance of a written contract or option may be *extended* by parol; and an extension of such written agreement may be shown where supported by some additional new and sufficient consideration. *Cummins v. Beavers*, 103 Va. 238, 106 Am. St. Rep. 881, 48 S. E. 891.

(1457)

CHAPTER XLVI.

TITLE UNDER EXERCISE OF POWERS.

- § 1316. Outline of Discussion.
- 1317. I. The Nature of Powers in General.
- 1318. Same—Definitions of Terms.
- 1319. II. The Scope of the Power.
 - 1. In Respect to the Appointees.
 - 1320. The Doctrine of "Illusory Appointments."
 - 1321. 2. Scope of the Power in Respect to the Estates or Interests That May Be Created.
 - 1322. 3. Scope of the Power in Respect to the Conditions and Purposes Thereof.
- 1323. III. The Several Sorts of Powers.
 - 1. Powers at Common Law.
 - 1324. 2. Statutory Powers.
 - 1325. 3. Powers Taking Effect as Executory Limitations or in Equity.
 - 1326. Application of Rule against Perpetuities to Appointments under Powers.
 - 1327. 4. Powers of Revocation.
 - 1328. 5. Powers Arising by Implication.
- 1329. IV. The Exercise of the Power.
 - 1330. 1. Effect of Proper Exercise of Power.
 - 2. Powers Coupled with a Trust—Exercise of Power Mandatory.
 - 1331. 3. Delegation of the Power.
 - 1332. 4. Exercise of the Power in Case of Several Joint Donees.
 - 1333. 5. Manner of Exercising the Power.
 - 1334. 6. The Exercise of a Power Is a Question of the Donee's Intention.
 - 1335. 7. Time of Exercise of Power.
- 1336. V. Exercise of Power Not in Accordance with Its Terms.
 - 1. Effect of Failure to Exercise Power.
 - 1337. 2. Excessive Exercise of Power.
 - 1338. 3. Defective Exercise of Power—Aided in Equity.
 - 1339. 4. Fraudulent Exercise of Power.
- 1340. VI. Extinction or Suspension of Powers—Discussion Outlined.
 - 1341. 1. Final and Complete Exercise of Power.

(1458)

- | | |
|---------|---|
| § 1342. | 2. Cessation of Purposes for Which Power Was Created. |
| 1343. | 3. Failure of Condition Precedent to the Exercise of the Power. |
| 1344. | 4. Donee Estopped to Exercise the Power. |
| 1345. | 5. Release of Powers. |

§ 1316. Outline of Discussion.

We shall consider this important subject under the following heads: (1) The nature of powers in general; (2) The scope of the power; (3) The several sorts of powers; (4) The exercise of the power; (5) Exercise of the power not in accordance with its terms; (6) The extinguishment or suspension of powers.

§ 1317. I. The Nature of Powers in General.

In the absence of restrictions imposed by the instrument creating an estate in land,—which restrictions are regarded with more or less disfavor by the law,¹—the power to aliene and dispose of one's interest in land is incident to the right of ownership itself.

But powers of disposition are frequently conferred upon persons, which are entirely out of proportion to their interests in the land;—being conferred sometimes, indeed, upon persons who have *no interest whatever* in the land itself, but only the power to dispose of it or to name (or *appoint*, as the technical phrase is) the persons who shall take interests therein, or upon persons whose interests in the land would of themselves justify a *very limited power of disposition*, but who are given extraordinary powers in the exercise of which they may dispose of interests in the land greater than they themselves possess.

Thus, while it is a general principle of equity that one who purchases land from a trustee *with notice* of the trust is himself nothing more than a constructive trustee, holding the legal title for the benefit of *cestui que trust*,² yet cases frequently arise where a *power of sale* or of *lease* is given expressly or by implication to a trustee, in which case he may sell or lease the land to

1. Ante, § 579, et seq.

2. Ante, § 488, et seq.

a purchaser, and the latter will take a good title even though he has *notice* of the trust, not because of any inherent right of disposition in the trustee, but by reason of the *power of sale or lease* conferred upon him.³

Such a power is always conferred upon the trustee in a deed of trust to secure debts, and is of frequent occurrence in trusts for married women and other persons under disability, when the trust is an *active* trust and the trustee vested with considerable discretion.⁴ Instances of it are found quite often also in wills, where land is devised to the executor, with power to sell for the payment of debts or legacies, or for the best interests of the estate committed to his care, the executor in such cases holding the legal title to the land as a trustee.⁵

But powers are by no means confined to trustees. They are often to be found vested in tenants for life or of lesser estates, who may be authorized to convey or lease greater interests than they themselves possess,—the general purpose being to enable the tenant to obtain terms of sublease, etc., more advantageous to himself and to the land than might be secured if he were confined to the disposition of his own interest alone.⁶

Such powers as those mentioned in the two preceding paragraphs, where the power is given to one already possessing an interest in the land upon which the power is to be exercised, are known as "*powers coupled with an interest*," and are essentially different in some respects from a "*naked*" or "*bare*" power, to be exercised by one who has no title to, nor interest in, the land itself.⁷

3. 1 Tiffany, Real Prop., § 276; *Collins v. Foley*, 63 Md. 158, 52 Am. Rep. 505; *Wentz's Appeal*, 106 Penn. St. 301.

4. *Walke v. Moore*, 95 Va. 729, 30 S. E. 374.

5. 1 Tiffany, Real Prop., §§ 273, 276; post, § 1331, note 8. So, a power of appointment may be vested in one who already has the fee simple estate for his own benefit. *Shearman v. Hicks*, 14 Gratt. (Va.) 96.

6. 2 Min. Insts. 816.

7. 1 Tiffany, Real Prop., § 279; *Godolphin v. Godolphin*, 1 Ves. Sr. 21; *Marlbrough v. Godolphin*, 2 Ves. Sr. 60; *Lovings v. Marsh*, 6 Wall. 337, 354; *Peter v. Beverly*, 10 Pet. 532; *Franklin v. Osgood*, 14 (1460)

A "naked" or "bare" power may be conferred upon one who has no interest whatever in the land itself, as where a testator, without devising the land to his executor, confers upon the latter by his will the power to sell the same for the payment of debts or legacies.⁸ So also, if A conveys or devises land to such persons as B shall appoint by deed or will, B possesses a "naked" or "bare" power. In such a case, B, though himself entitled to no estate in the land, has a general power of appointment or disposition, which could scarcely be greater if he owned the fee simple.⁹

§ 1318. Same—Definitions of Terms.

A "power," in the sense here used, may be defined as a *proprietary* right in a person to create an estate or interest in the land or to impose a lien or charge thereon, which, when exercised, takes effect in diminution, derogation or destruction of the rights of others or of the person himself in the land, by reason of the *power alone*, without reference to the person's *ownership of the estate*.¹

The creator of the power is usually designated the "donor of the power;" the person upon whom the power is conferred is the "donee of the power;" while the person in favor of whom a power of appointment is exercised is the "appointee," and the act of exercising it is the "appointment."²

Johns. (N. Y.) 553; *Gray v. Lynch*, 8 Gill (Md.) 403. Powers of *appointment*, etc., coupled with an interest, are, however, to be carefully distinguished from *powers of attorney* (agency) coupled with an interest, the latter being of importance only in connection with the question whether the agency is revoked by the *death* of the principal, whereas a power of *appointment*, etc., conferring as it does a *proprietary right*, is usually irrevocable, whether coupled with an interest or not. See *Hunt v. Rousmanier*, 8 Wheat. 174; *Sulphur Mines Co. v. Thompson*, 93 Va. 294, 25 S. E. 232. A brief discussion of powers of attorney to execute deeds will be found, ante, § 1105.

8. 1 Tiffany, Real Prop., § 273.

9. Post, § 1319; *Freeman v. Butters*, 94 Va. 406, 26 S. E. 845.

1. 1 Tiffany, Real Prop., pp. 603, 604.

2. 1 Tiffany, Real Prop., § 277.

§ 1319. II. The Scope of the Power—1. In Respect to the Appointees.

Powers may be either *general* or *special* (or “particular” or “limited”). A power is *general*, if the donee is thereby authorized to dispose of *any* estate or interest in the land, and *to any person whatsoever*; while it is a *special*, particular or limited power if, by the instrument creating it, the appointment is restricted to *particular persons* or a particular class of persons, or is restricted as to the *estates* or interests in the land that may be created, or as to the *purposes* or *conditions* of its exercise.¹

In the case of a *general* power, since there is no restriction upon the possible appointees, the donee of the power may name *himself* as the appointee.² Should he do so, or should he appoint to a *volunteer*, the exercise of the power cuts off the rights of those to whom the estate is limited *in default of appointment*, and the land becomes subject to the donee's debts, as if it were his own.³

But the mere potential right of the donee of the power to make himself the appointee, unless and until it is actually exercised in his own favor (or in favor of a *volunteer*), does not, at common law, constitute him *the owner* of the property or render it liable for his debts; for he may make no appointment at all, either to himself or to another, and until the power is exercised the person who is to take *in default of appointment* has at least an *equal equity* with the donee's creditors and, in addition, the *legal title*.⁴ And while in England it has now been enacted that the donee's creditors may subject property over which the donee has a power which he *may exercise for his own benefit*,⁵ no such statute ex-

1. 1 Tiffany, Real Prop., § 277.

2. 1 Tiffany, Real Prop., § 281; Hicks v. Ward, 107 N. C. 392; Beck's Appeal, 116 Penn. St. 547.

3. Freeman v. Butters, 94 Va. 406, 26 S. E. 845.

4. Freeman v. Butters, 94 Va. 406, 26 S. E. 845; Holmes v. Coghill, 7 Ves. 499; Jones v. Clifton, 101 U. S. 225; Crawford v. Langmaid, 171 Mass. 309; Ryan v. Mahan, 20 R. I. 417; Gilman v. Bell, 99 Ill. 144.

5. Williams, Real Prop. 293; 1 Tiffany, Real Prop., § 292.
(1462)

ists in Virginia and the common law doctrine remains unchanged.⁶

In the case of a *special* power, on the other hand, where the limitation upon the exercise of the power relates to the possible appointees, the appointment can be made only in favor of the specified person or persons, or the specified class of persons; for instance, a power given by will to B to appoint among the testator's *children* cannot be lawfully exercised by an appointment to his *sons-in-law* or *grandchildren*.⁷

A special power to appoint among a class of persons, such as children, may vest a discretion in the donee of the power to select among members of the class, in which case the power is termed an "*exclusive*" power, because the donee has the power to exclude certain members of the class from participation in the appointment.⁸ But more usually, perhaps, the power is "*nonexclusive*," that is, the donee is given no discretion nor authority to exclude any member of the class altogether, however it may be as to his authority to give *unequal shares* to the various members of the class. Instances of nonexclusive powers arise in case of powers to appoint "to" or "amongst" or "between" all the children of such a person, or "amongst the testator's sons in such shares as the donee shall determine," etc.⁹

§ 1320. Same—The Doctrine of "Illusory Appointment."

In the case of *nonexclusive* powers, such as are described in

6. Freeman v. Butters, 94 Va. 406, 26 S. E. 845; Dold v. Geiger, 2 Gratt. (Va.) 102; Hauser v. King, 76 Va. 738; Penn v. Guggenheimer, 76 Va. 839, 854.

7. 2 Min. Insts. 820; Smith v. Lord Camelford, 2 Ves. Jr. 698; Hudson v. Hudson, 6 Munf. (Va.) 356; Knight v. Yarborough, Gilm. (Va.) 31; Morris v. Owen, 2 Call (Va.) 526; Austin v. Oakes, 117 N. Y. 577; Smith v. Hardesty, 88 Md. 387.

8. 1 Tiffany, Real Prop., § 281; Ingraham v. Meade, 3 Wall. Jr. (U. S. C. C.) 32; Graeff v. DeTurk, 44 Penn. St. 527; Hulwig v. Fennner, 9 R. I. 410; Portsmouth v. Shackford, 46 N. H. 423.

9. 1 Tiffany, Real Prop., § 281; Wilson v. Piggott, 2 Ves. Jr. 351; Knight v. Yarborough, Gilm. (Va.) 27; Hudson v. Hudson, 6 Munf. (Va.) 352; Thrasher v. Ballard, 35 W. Va. 524, 14 S. E. 232; Hatchett v. Hatchett, 103 Ala. 556; Wright v. Wright, 41 N. J. Eq. 382, note.

the preceding section, the question sometimes arises as to the right of the donee to give a mere *nominal share* to one or more members of the class or, in technical phrase, to make an "illusory appointment" to certain members of the class.

In England, independently of statute, the rule was established in equity that such an "illusory appointment" is *invalid*. It was never required, however, that there should be an *equal* distribution amongst the class, but only that a *substantial share* be allotted to each member, a large latitude of discretion being allowed the donee of the power.¹ But this doctrine has now been abrogated in England by a statute which, in effect, authorizes a donee in all such cases to make an appointment *excluding* members of the class, if he sees fit to do so, unless a *minimum* share for each member of the class is mentioned in the original instrument creating the power.²

In Virginia, there being no statute altering the rule, the former English doctrine of illusory appointments obtains, and such an appointment is held to be *void*.³

If the appointment be set aside as illusory, or for other cause, or if no appointment is made, the fund is to be distributed *equally* in equity among *all* the members of the class, the power of appointment in such case being *in the nature of a trust*.⁴

1. 2 Min. Insts. 820, 821; Sugden, Powers, 449, 938; 2 Th. Co. Lit. 590, n. (B); Butcher v. Butcher, 1 Ves. & B. 79.

2. 37 & 38 Vict., c. 37, § 1. An earlier English statute sanctioned illusory appointments. See Gainsford v. Dunn, L. R. 17 Eq. 405.

3. 2 Min. Insts. 820, 821; Rhett v. Mason, 18 Gratt. (Va.) 541; McCamant v. Nuckolls, 85 Va. 331, 12 S. E. 160; Cowles v. Brown, 4 Call (Va.) 477; Knight v. Yarborough, Gilm. 27. See, also, Thrasher v. Ballard, 35 W. Va. 524, 14 S. E. 232; Hatchett v. Hatchett, 103 Ala. 556; Cruse v. McKee, 2 Head. (Tenn.) 1; Degman v. Degman, 98 Ky. 717. But in some of the states the donee is regarded as having the right to make mere nominal appointments to some members of the class. Graeff v. De Turk, 44 Penn. St. 527; Fronty v. Godard, Bailey, Eq. (S. C.) 517; Lines v. Darden, 5 Fla. 51.

4. 2 Min. Insts. 821; 2 Th. Co. Lit. 590, 591; Mitchell v. Johnson, 6 Leigh (Va.) 473; Hudson v. Hudson, 6 Munf. (Va.) 352; Knight v. Yarborough, Gilm. 27. For powers "in the nature of a trust" or "coupled with a trust," see post, § 1330.
(1464)

§ 1321. Same—2. Scope of the Power in Respect to the Estates or Interests That May Be Created.

A power may be *special* (or particular or limited) by reason of restrictions imposed upon the donee with respect to the *estate* he may create, as well as with respect to the *appointees*.

In general, the terms in which the power is expressed will determine what kind and quantity of estate the donee may create, the tendency being towards liberality in the construction of the terms. Thus, a power to divide property among the children of the donor of the power is held to confer a *discretion* upon the donee, and he is not bound to give a *fee simple* to each child, but may appoint to *one for life*, with a *remainder* or *executory limitation* to another.¹

So, a power to appoint a fee simple estate or a power in general terms will usually authorize an appointment of a freehold less than a fee simple,² or the creation of a mortgage.³

So also, a power to *sell* land (as in case of an executor or trustee) carries with it, without express mention, the power to make a *conveyance* of the land sold in fee simple to the purchaser.⁴ But a mere power of *sale*, in the absence of evidence of a contrary intent on the part of the donor of the power, does not usually authorize a *mortgage* of the land;⁵ nor does it au-

1. 1 Tiffany, Real Prop., § 281; Sugden, Powers, 682; Beardsley v. Hotchkiss, 96 N. Y. 201, 218. See Lawrence's Estate, 136 Penn. St. 354.

2. 2 Min. Insts. 820; 1 Tiffany, Real Prop., § 281; Bovey v. Smith, 1 Vern. 84.

3. 1 Tiffany, Real Prop., § 281; Thwaytes v. Dye, 2 Vern. 80; Asay v. Hoover, 5 Penn. St. 21; Hicks v. Ward, 107 N. C. 392.

4. 1 Tiffany, Real Prop., § 281; Sugden, Powers, 398; Hemhauser v. Decker, 38 N. J. Eq. 426.

5. 1 Tiffany, Real Prop., § 281; Sugden, Powers, 425; 2 Perry, Trusts, § 768; Hoyt v. Jaques, 129 Mass. 286; Ferry v. Laibie, 31 N. J. Eq. 566; Bloomer v. Waldron, 3 Hill (N. Y.) 361; Butler v. Gazzam, 81 Ala. 491; McMillan v. Cox, 109 Ga. 42; Wilson v. Maryland Ins. Co., 60 Md. 150; Stokes v. Payne, 58 Miss. 614, 38 Am. Rep. 314; Price v. Courtney, 87 Mo. 387, 56 Am. Rep. 453. But it is otherwise if the design of the power of sale is to raise money for some particular

thorize an *exchange*, but only a sale for *money*.⁶

§ 1322. Same—3. Scope of the Power in Respect to the Conditions and Purposes Thereof.

A power may also be *special* by reason of the restricted purposes or conditions, for or upon which the power is to be exercised.

Thus, if there be a *condition precedent* to the exercise of the power it must be complied with, or else the power cannot be validly exercised. Hence, if a power of sale, such as that given to a trustee in a deed of trust to secure debts, is to be exercised only *upon the request* or *with the assent* of another, a sale without such request or assent is invalid.¹ So, a power to sell land, *when necessary* for the support of a certain person, is not properly exercised if there be no such necessity.²

So also, a power in a trustee or executor to sell land for the *payment of debts* is not validly exercised if there are *no debts* to be paid.³

purpose or to pay off charges upon the land. Sugden, Powers, 425; Kent v. Morrison, 153 Masa. 137; Faulk v. Dashiell, 62 Tex. 642, 50 Am. Rep. 542; Loebenthal v. Raleigh, 36 N. J. Eq. 169; Devaynes v. Robinson, 24 Beav. 86.

6. 1 Tiffany, Real Prop., § 281; 2 Perry, Trusts, § 769; Woodward v. Jewell, 140 U. S. 247; Russell v. Russell, 36 N. Y. 581; Cleveland v. State Bank, 16 Ohio St. 236.

1. 1 Tiffany, Real Prop., § 285; Sugden, Powers, 252; Richardson v. Crooker, 7 Gray (Mass.) 190; Gordon v. Gordon (Tenn. Ch. App.), 46 S. W. 357.

2. Stevens v. Winship, 1 Pick. (Mass.) 318, 11 Am. Dec. 178; Minot v. Prescott, 14 Mass. 495; Hull v. Culver, 34 Conn. 403; Scheidt v. Crecelins, 94 Mo. 322.

3. 1 Tiffany, Real Prop., § 285; Sweeney v. Warren, 127 N. Y. 426; Hemphill v. Pry, 183 Penn. St. 593; Moore v. Moore, 41 N. J. L. 440; Ward v. Barrows, 2 Ohio St. 242. But a purchaser, it seems, is not charged with notice of the nonexistence of debts, unless the power is so tardily exercised as to raise a presumption of the payment of the debts from lapse of time (twenty years, in Virginia). 1 Tiffany, Real Prop., § 285; Smith v. McIntyre, 37 C. C. A. 177, 95 Fed. 585; Rutherford v. Clark, 4 Bush (Ky.) 27; Doran v. Piper, 164 Penn. St. 430; Smith v. Henning, 10 W. Va. 596.

(1466)

§ 1323. III. The Several Sorts of Powers—1. Powers at Common Law.

It is in general repugnant to the common law notions of conveyancing (which demanded that freehold estates in land should be created by *livery of seisin*) to permit the creation of estates by means of the exercise of a *power*, other than such as is merely inherent in the *ownership* of the land itself; and hence, so far as *freehold* interests in *land* are concerned, the creation of them by the exercise of such powers was in the main unknown to the original common law,¹ prior to the introduction of *Uses*.

To this general rule there was perhaps one exception, in the case of a power given in a *will* to executors, authorizing them to sell lands for the payment of debts or legacies. Such powers did indeed exist at common law in those rare cases where land was devisable by the *local custom* of particular places;² and after the passage of the statute of Wills (32 Hen. VIII, c. 1, explained by 34 Hen. VIII, c. 5), making lands devisable generally, the validity of such powers in wills continued to be recognized.³ It is probable, however, that, instead of treating this kind of power as an *exception* to the general common law principle, it should be classified, like other powers in wills, under the head of powers of appointment taking effect as *executory limitations*, presently to be described.⁴

§ 1324. Same—2. Statutory Powers.

Powers to aliene land are said to be "*statutory*," when they are conferred by statute. In such case, an alienation under the exercise of the power derives its effect from *the statute*, not from *the instrument* through or by which the alienation is made.¹

Instances of such powers may be found in the English statute

1. Ante, §§ 146, 449.

2. Ante, §§ 6, note 7, 1240; 1 Tiffany, Real Prop., § 273; Co. Litt. 112b.

3. 1 Tiffany, Real Prop., § 273; Co. Litt. 112b; Townsend v. Walley, Moore, 341.

4. Post, § 1325.

1. Sugden, Powers, 45; 1 Tiffany, Real Prop., § 274.

conferring upon life tenants the power to make leases extending beyond their own lives;² or in the Bankruptcy Act of Congress, conferring upon the assignee in bankruptcy the power to sell the bankrupt's property.³

The most prominent instance, perhaps in Virginia of such powers arises in the case of the statutory power conferred upon administrators *c. t. a.* to sell and convey lands devised to be sold by executors, where none of the executors qualify, or those qualifying die or are removed before the trust is executed or completed.⁴ Another instance is the Virginia statute which confers upon a trustee in a deed of trust to secure debts the power to sell the land for the payment of the debt secured in a mode and under conditions prescribed by the statute, in case the deed of trust should omit to confer such powers upon him.⁵

§ 1325. Same—3. Powers Taking Effect as Executory Limitations or in Equity.

One of the advantages of uses, as they existed in England prior to the statute of Uses, was that they set at defiance the common law rules flowing from the necessity of livery of seisin to create freehold estates, and permitted such estates (in the *use*) to *spring up in futuro*, without any preceding particular estate, or to *shift* from one to another upon the happening of some future contingency.¹

Among other methods of creating such future estates in uses were recognized *appointments to future uses*, whereby the grantor would convey land to a feoffee to hold to such uses as he (the feoffor) or another should appoint in the future by some designated method, as by deed or by will; the appointee, when thus designated, taking the *use* by virtue of the original feoffment to

2. 1 Tiffany, Real Prop., § 274.

3. Act of 1898, § 70; Collier, Bankruptcy, 454.

4. Va. Code, 1904, § 2663. See 2 Va. Law Reg. 513, 643. For further discussion of the statutory power thus conferred, see post, § 1332.

5. Va. Code, 1904, § 2442.

1. Ante, § 449.

uses, and not by virtue of the deed or the will appointing him.

When the statute of Uses² was passed, which converted uses into legal estates, this form of conveyance continued of frequent occurrence, with the same results, save that the appointee would thenceforward take a *legal* estate where before he would have taken a mere *use* or *equitable interest*.³

A similar consequence flowed from the enactment of the statute of Wills, five years later,⁴ so that thereafter land might be devised to vest *in futuro* according to the direction or "appointment" of a person named in the will.⁵

In both these cases, there is in effect an *executory limitation* to a person to be named *in futuro*; and upon an appointment by the donee of the power, the appointee takes an interest in the land, as if there had been an executory limitation to him in the *original instrument* creating the power. In other words, the deed, will or other instrument by or through which the donee exercises the power is not the appointee's source of title (which is to be found in the *original instrument* of the donor of the power) but is merely the *vehicle or channel* through which the appointee's claim to the property under the original instrument is assured.⁶

Thus, one may convey land to A and his heirs to such uses as A (or B, or even the grantor himself) may appoint, and upon the making of the appointment in favor of C and his heirs, the *use*, prior to the statute of Uses, and since that statute (in England)⁷ the *land itself*, vests in C in fee simple by way of *spring-*

2. 27 Hen. VIII, c. 10; Va. Code, 1904, § 2426.

3. 2 Min. Insts. 817; 1 Tiffany, Real Prop., § 275.

4. 32 Hen. VIII, c. 1; 34 Hen. VIII, c. 5; Va. Code, 1904, § 2512, et seq.

5. 2 Min. Insts. 818; 1 Tiffany, Real Prop., § 275; Sugden, Powers, 199; Townsend v. Walley, Moore, 341.

6. Post, § 1329; 2 Min. Insts. 821; Sugden, Powers, 31, 147, 196; 2 Th. Co. Lit. 590, n. (B); Doolittle v. Lewis, 7 T. R. 48; Jackson v. Davenport, 20 Johns. (N. Y.) 551.

7. The Virginia statute of Uses, it will be remembered, applies only to conveyances operating *without transmutation* of the possession,—that is, to conveyances by bargain and sale, covenant to stand
(1469)

ing limitation, just as if the *original limitation* had been to him; the fee *resulting*, until appointment, to the grantor or his heirs.⁸

Similarly, A may *devise* land to such persons and for such estates as B may appoint, and if B appoints to C in fee or for life, the estate named will vest in C as by an *executory devise under A's will*.⁹

And doubtless the same result would be reached in Virginia under the *statute of Future Grants*, enacting that "any estate may be made to commence *in futuro* by *deed* in like manner as by will; and any estate which would be good as an *executory devise or bequest* shall be good if created by *deed*."¹⁰

It is to be observed, however, in accordance with the general rule, that if the future estate thus created by the exercise of the power of appointment *can* take effect as a *remainder*, it must do so, and thenceforward cannot be sustained as an *executory limitation*.¹¹

Where a future use is executed by the statute of Uses, it is converted into a legal estate, and is good by way of an executory limitation; if unexecuted by the statute of Uses, it remains a use or equitable estate; but in either event, the future estate is good, and is recognized in equity, if not at law; and so it is with other sorts of equitable estates. Hence, we sometimes find *future equitable estates* created under the exercise of powers, which, while not taking effect strictly as *executory limitations* under the statutes of Uses or Wills, are nevertheless good, and governed by rules analogous to those controlling powers of ap-

seised, and lease and release. Va. Code, 1904, § 2426; ante, §§ 455, 1232, et seq. As to these forms of conveyance, it is doubtful whether powers of appointment can be created by them,—at least in cases where the appointees are not within the consideration. 2 Min. Insts. 818; post, § 1329.

8. 1 Tiffany, Real Prop., § 275.

9. 1 Tiffany, Real Prop., § 275.

10. Va. Code, 1904, § 2418; ante, § 1235; 2 Min. Insts. 818. See *Faulkner v. Davis*, 18 Gratt. (Va.) 674, 98 Am. Dec. 698.

11. Ante, § 822; 1 Tiffany, Real Prop., § 275; *Whitby v. Mitchell*, 42 Ch. Div. 494, 44 Ch. Div. 85.

(1470)

pointment taking effect as executory limitations. These are usually designated "*equitable*" powers.¹²

§ 1326. Same—Application of Rule against Perpetuities to Appointments under Powers.

The rule against perpetuities is as fully applicable to executory limitations created by the *exercise of a power* as to other sorts of executory limitations. Whether such an executory limitation does violate the rule is to be determined in part by an examination of the terms of the *instrument creating the power* and in part by the terms of the *instrument by or through which the power is exercised*.

If, by the terms of the *original instrument* creating it, the power may *by possibility* be exercised at a period *later* than that prescribed by the rule, the power cannot be validly exercised at all, for the rule declares that the limitation is invalid unless it be so limited that *it must necessarily vest*, if at all, within a life or lives in being, ten months and twenty-one years thereafter.¹ Hence, a power given to a life tenant, yet *unborn*, to appoint by *will* (or, it would seem, by *deed*) is void, since the appointment might be made at a time beyond the legal period.²

Supposing the power to be one which, by the terms of its creation, *must be exercised*, if at all, within the time fixed by the rule against perpetuities, the question yet remains, in case it *be exercised* by the appointment of a *future estate* (measured from the date of the exercise of the power), whether the future estate thus created is valid under the rule against perpetuities, and at what time the computation of the period is to begin.

If the limitation in question be created under the exercise of a *special power*, the period fixed by the rule begins to run at the

12. 2 Min. Insts. 818; 1 Tiffany, Real Prop., § 276; Sugden, Powers, 200.

1. Ante, § 847; 1 Tiffany, Real Prop., § 294; Gray, Perpet., § 475; Bristow v. Boothby, 2 Sim. & S. 465; Woodbridge v. Winslow, 170 Mass. 388.

2. Morgan v. Gronow, L. R. 16 Eq. 1.

time of the *creation* of the power, not at the time of its *exercise*.³

But if the power be *general*, not restricted as to time, estate or objects, and exercisable either by conveyance or by will, this is equivalent, it is said, to absolute ownership, and its exercise is on the same footing as an original conveyance. Consequently, the period fixed by the rule in such cases is to be computed from the time of the *exercise* of the power, and not from its *creation*.⁴

§ 1327. Same—4. Powers of Revocation.

Growing out of, and closely analogous to, powers of appointment taking effect as executory limitations are *powers of revocation*.

A power, to reside in the grantor, to revoke a common law conveyance was deemed by the common law *repugnant to the conveyance*, and was never admitted.¹ But upon the introduction of uses, which comprised in essence merely the right to direct the person seised of the legal estate in what manner and to whom he should convey the land, it was concluded that there was no repugnancy in permitting the person creating the use to follow the bent of his will; and if he reserved the power to revoke, to extend that indulgence to him accordingly, the court of chancery affecting great liberality in directing the uses according to the apparent intent of the parties. And that doctrine having been fully established prior to the statute of Uses, and that statute proposing that *cestui que use* should have the *land* as be-

3. 1 Tiffany, Real Prop., § 294; Gray, Perpet., § 514, et seq.; Sugden, Powers, 396; Lawrence's Estate, 136 Penn. St. 355; In re Boyd's Estate (Penn.) 49 Atl. 299; Thomas v. Gregg, 76 Md. 169. And if the power is to be exercised by *will only*, though it is *general* in point of appointees, estate, and conditions and purposes, it is regarded as a *special power* within the doctrine. See Gray, Perpet., §§ 526, 526b; In re Powell's Trusts, 39 L. J. Ch. 188; Lawrence's Estate, *supra*; Genet v. Hunt, 113 N. Y. 158. But see Rous v. Jackson, 29 Ch. Div. 521; In re Flower, 55 L. J. Ch. 200.

4. 1 Tiffany, Real Prop., § 294; Gray, Perpet., § 524; Bray v. Bree, 2 Cl. & F. 453; Miffin's Appeal, 121 Penn. St. 205, 6 Am. St. Rep. 781; Lawrence's Estate, 136 Penn. St. 355.

1. 2 Min. Insts. 815.

fore he had the *use*, the legal estate thus created under the statute of Uses has always been deemed revocable, if the right to revoke is reserved, in like manner as the *use* had been before.²

By means of a power of this sort the grantor of an estate may reserve to himself, or even to a third person, the power to revoke the grant, and to limit new uses in lieu thereof; as in case of a conveyance by A to the use of B and his heirs, reserving a power in A to revoke the use thus limited, in which case B's estate in fee will terminate on the exercise of such power.³ And so, in case of a devise to T and his heirs to his own use for his life, and after his death to the use of C and his heirs, but with power in T, by deed or will, to revoke the use in favor of C and his heirs, and to limit new uses in lieu thereof, in which case C's interest terminates upon the exercise of T's power of revocation, and the fee shifts over to T's appointees.⁴

§ 1328. Same—5. Powers Arising by Implication.

Powers sometimes arise merely by implication from the language used in a conveyance or will. Thus, in case of a trustee or executor appointed by will, a power to sell land, though not expressly given by the will, may be *implied* from its provisions, if they impose upon him duties as to the distribution of the estate, to the performance of which a power of sale is essential;¹—for example, when he is required by the will to divide the estate among certain persons, and the estate is not divisible *in kind*.²

So also, in some jurisdictions at least, a power of disposition is

2. 2 Min. Insts. 815; Gilbert, Uses, 313, 158, 159, n. (5).

3. 2 Min. Insts. 815, et seq.; 1 Tiffany, Real Prop., § 275; Sugden, Powers, 363, 478; Jones v. Clifton, 101 U. S. 225; Riggs v. Murray, 2 Johns. Ch. (N. Y.) 565; Reidy v. Small, 154 Penn. St. 505.

4. 2 Min. Insts. 815; 2 Lom. Dig. 206, et seq.; Sugden, Powers, 106, et seq.; Gilbert, Uses, 314, et seq.

1. 1 Tiffany, Real Prop., § 280; 2 Perry, Trusts, § 766; Going v. Emery, 16 Pick. (Mass.) 107, 26 Am. Dec. 645; Lindley v. O'Reilly, 50 N. J. L. 636, 7 Am. St. Rep. 802; Belcher v. Belcher, 38 N. J. Eq. 126; Winston v. Jones, 6 Ala. 550; Vaughan v. Farmer, 90 N. C. 607.

2. Corse v. Chapman, 153 N. Y. 466; Tompkins v. Miller (N. J. Eq.), 27 Atl. 484.

implied in a life tenant, by reason of a limitation over to another of "what remains undisposed of" by such life tenant at his or her death, in which case the first taker takes merely a life estate, coupled with a power of appointment of the reversion, and in default of appointment to the second takers.³

In Virginia, however, the doctrine formerly was that, upon a grant or devise to a life tenant, with such an implied power of disposition, where the power of disposition is complete, absolute and unqualified (as where the disposition may be made either by deed or will, and in fee simple or for any lesser estate, and for any purpose), the first taker has a *fee simple* estate, and the limitation over is *void*, as a *remainder* because limited after a fee, and as an *executory limitation* because of uncertainty and repugnancy.⁴ This doctrine has now been seriously modified, if not abolished, by statute.⁵

§ 1329. IV. The Exercise of the Power—1. Effect of Proper Exercise of Power.

It is a well established principle that when the donee of a power of appointment exercises the power and appoints one to take under it, the appointee holds, not under the donee of the

3. 3 Va. Law Reg. 65, et seq.; 1 Tiffany, Real Prop., § 280; Clark v. Middlesworth, 82 Ind. 240; Paine v. Barnes, 100 Mass. 470; Smith v. McIntyre, 37 C. C. A. 177, 95 Fed. 585; Roberts v. Lewis, 153 U. S. 367; Henderson v. Blackburn, 104 Ill. 227. See Smythe v. Smythe, 90 Va. 638, 19 S. E. 175. But it is usually held that where an estate is given to one generally (e. g. "to A") with a power of disposition implied by a limitation over of "what remains undisposed of," or the like words, it creates a *fee simple* in the first taker, as a matter of the construction of the grantor's or testator's intent. 3 Va. Law Reg. 67; Roberts v. Lewis, 153 U. S. 367, 144 U. S. 653.

4. Ante, §§ 162, 858; May v. Joynes, 20 Gratt. (Va.) 692; Cole v. Cole, 79 Va. 251; Hall v. Palmer, 87 Va. 354, 24 Am. St. Rep. 653, 11 L. R. A. 610; Bowen v. Bowen, 87 Va. 438, 24 Am. St. Rep. 664, 12 S. E. 885; Farish v. Wayman, 91 Va. 430, 21 S. E. 810, 1 Va. Law Reg. 219, 220; Robertson v. Hardy (Va.), 23 S. E. 766; Bing v. Bur-russ, 106 Va. 478, 56 S. E. 222; Brown v. Strother, 102 Va. 147, 47 S. E. 236. But see Smythe v. Smythe, 90 Va. 638, 19 S. E. 175.

5. See Acts 1908, p. 187; ante, §§ 162, 858; 14 Va. Law Reg. 161.
(1474)

power, but under the donor, that is, under the instrument executed by the donor which creates the power, the intermediate seisin of the donee of the power under the same instrument, if any, being *wholly defeated* by the appointment.¹

If, however, the conveyances creating the power of appointment is a bargain and sale or covenant to stand seised under the *statute of Uses*, there is perhaps a question whether the appointee, who has not supplied the valuable consideration or is not related to the donor of the power, is within the consideration so as to permit him to take the interest arising after the appointment under the donor's deed.² But it is probable, in Virginia at least, that even if the appointee in such case cannot take by way of *use* under the statute of Uses, he could take by way of *grant* under the statute of Future Grants.³

We have already seen instances of the application of the principles that an appointee under a power takes under the donor and not under the donee. Thus, it has been shown that the dower of H's wife is defeated in case of a conveyance "to such uses as H shall appoint, and until such appointment to the use of H and his heirs," in case H (even without the joinder of his wife) should appoint in his lifetime.⁴ So also, though the rule in Shelley's Case is applicable only where the ancestor's freehold and the remainder to the heirs, etc., are limited by the same instrument, yet in accordance with the same principle, if there be a limitation "to the use of A for life, and after his death to such uses as Z shall appoint," and Z, in A's lifetime, appoints the use

1. Ante, § 1325; 2 Min. Insts. 169; Ray v. Pung, 5 B. & Ald. 561; Maundrell v. Maundrell, 10 Ves. 263, et seq.; Paine's Case, 8 Co. 34b, n. (A); Cunningham v. Moody, 1 Ves. Sr. 177; Doe v. Martin, 4 T. R. 65; Doe v. Welles, 7 T. R. 478; Venables v. Morris, 7 T. R. 342, 347; Roach v. Wadham, 6 East. 289.

2. 2 Min. Insts. 170; 2 Lom. Dig. 193; Gilbert, Uses, 398, note (2), Introduction, lv; 1 Spence, Eq. Jur. 450, 451. See Va. Code, 1904, § 2426.

3. Va. Code, 1904, § 2418; 2 Min. Insts. 170, 780; ante, § 1235, et seq.; Rowletts v. Daniel, 4 Munf. (Va.) 473; Watts v. Cole, 2 Leigh (Va.) 653, 662. See ante, § 1232, note 5.

4. Ante, § 301.

to the *heirs of A*, it is the same as if the *original* instrument had limited the estate in the first instance to the heirs of A by way of remainder after A's life estate, so that the rule in Shelley's Case applies at common law.⁵

And so, if land be leased to W with power of appointment and with a covenant by W and his *assigns* to pay the rent, and W appoints to J, the appointee cannot be sued by the original lessor upon W's covenant to pay rent because, since J does not hold under W but under the original donor of the power, there is *no privity of estate* between W and J, such as is required to constitute a covenant running with the land.⁶

§ 1330. Same—2. Powers Coupled with a Trust—Exercise of Power Mandatory.

The donee of a power, strictly so called, can never be *compelled* to exercise the power, it being in the nature of a privilege or right, the exercise of which is optional and discretionary with the donee.¹

But sometimes what is really a *trust* is appareled in the garb of a power, in which case a court of chancery will compel the execution of the so called power. Such a power is denominated "a power coupled with a trust" or "a power in the nature of a trust," and arises in cases where the execution of the power is imposed upon the donee as an *imperative duty*, admitting no exercise of *discretion* on his part. Thus, if a power of sale be given by will to the executor therein named, with specific directions to apply the proceeds for the benefit of certain persons, or to pay certain debts, this would be a *power coupled with a trust*, the specific execution of which chancery would enforce.²

5. Ante, § 774; 2 Min. Insts. 407; Fearne, Rem. 74; Venables v. Morris, 7 T. R. 342, 347.

6. Roach v. Wadham, 6 East. 289. See ante, § 422.

1. 1 Tiffany, Real Prop., § 278; Sugden, Powers, 588; 2 Story, Eq. Jur., § 1061; 1 Perry, Trusts, § 248; Dillard v. Dillard, 97 Va. 442, 34 S. E. 60; Atwood v. Shen. Val. R. Co., 85 Va. 966, 9 S. E. 748.

2. Sugden, Powers, 588; Brown v. Higgs, 8 Ves. 561; Atwood v. (1476)

The nonexecution of such a power is aided in equity on the same principle upon which courts of equity enforce any trust; and if the donee fails or refuses to exercise the power, or dies without exercising it, the court of equity will itself exercise it, so far as it can. In such case, if the power be for the benefit of a *class* of persons (as "children," "sons," etc.), though the *donee* might have had the right to exercise a discretion in the selection of the members of the class who should benefit thereby, yet if he fails or refuses to exercise the power, and the court of equity is called upon to enforce an execution thereof, the court has no authority to exercise such discretion, but must enforce it in favor of *all* the members of the class *equally*, upon the maxim that *equality is equity*.³

In such cases of powers coupled with a trust, that is, powers to appoint among a certain class of persons, where the donee has failed to appoint, it sometimes becomes necessary for the court of equity, in ascertaining the share of each member of the class, to determine whether each member of the class takes a *vested interest* in the property from the date of the *original instrument* creating the trust (in which case, the heirs, devisees or assignees of any *deceased* member of the class may be assigned by the court the portion that would have gone to the deceased member, had he been living at the date of the distribution); or whether the intent of the donor of the power is that the property should go only to such members of the class as might have taken it if the power were *properly exercised by the donee thereof*.

Shen. Val. R. Co., 85 Va. 966, 9 S. E. 748; *Faulkner v. Davis*, 18 Gratt. (Va.) 651, 98 Am. Dec. 698; *Greenough v. Welles*, 10 Cush. (Mass.) 571; *Bailey, Petitioner*, 15 R. I. 60; *Druid Park Co. v. Oettinger*, 53 Md. 46; *Randolph v. East Birmingham L. Co.*, 104 Ala. 355; 1 *Tiffany, Real Prop.*, § 278; 2 *Story, Eq. Jur.*, § 106; 1 *Perry, Trusts*, c. 8.

3. 2 *Min. Insts.* 821; 1 *Perry, Trusts*, §§ 250, 255; *Lambert v. Thwaites*, L. R. 2 Eq. 151; *Brown v. Higgs*, 8 Ves. 561; *Parsons v. Baker*, 18 Ves. 476; *Morris v. Owen*, 2 Call (Va.) 520; *Knight v. Yarrowborough, Gilm.* (Va.) 27; *Mitchell v. Johnson*, 6 Leigh (Va.) 461; *Rhett v. Mason*, 18 Gratt. (Va.) 541; *Tomlinson v. Nickell*, 24 W. Va. 148; *Withers v. Yeadon*, 1 Rich. Eq. (S. C.) 324.

(1477)

Such a question would arise in case of a power given to A to appoint by *last will* among a class, such as the *testator's children*. If A fails to appoint by will, and some of the children of the testator have died during A's lifetime, leaving children, the court must determine whether the latter children are to be included in the distribution of the fund, taking their parent's portion, or are to be excluded, leaving the fund to be distributed among those members of the class named (the testator's *children*) who are living at the time of A's death (when the power was to be *exercised*).

If the instrument creating the power contains an *express gift to the class*, accompanied by a power in another to determine the shares in which they shall take, the court of equity regards the gift as *vested* in all the members of the class *from the beginning*, and therefore the heirs or devisees of the dead members of the class will be given the portions that would have gone to the deceased members had they continued alive until the distribution.⁴

But if the instrument creating the power does not expressly give the property to the class, but merely confers a power upon the donee to appoint among the class, the presumption is that only such members of the class are to take as could have taken if the power had been exercised by the donee himself, so that if he is to appoint among "children" by *will* (without an express gift to the "children"), since he can only appoint among the *children*, and not among the *grandchildren*, the donee would be confined in his appointment by will to such of the *children* as are living at his death, and the court, in its distribution, would be confined to the same persons.⁵

§ 1331. Same—3. Delegation of the Power.

It is a general maxim of the law, applicable to all cases where

4. *Lambert v. Thwaites*, L. R. 2 Eq. 151; *Casterton v. Sutherland*, 9 Ves. 445; *Wilson v. Duguid*, 24 Ch. Div. 244; *Rhett v. Mason*, 18 Gratt. (Va.) 541; *Carson v. Carson*, 62 N. C. 57; 1 *Tiffany*, Real Prop., § 290. See post, § 1336.

5. 1 *Tiffany*, Real Prop., § 290; *Lambert v. Thwaites*, L. R. 2 Eq. (1478)

a *discretion* has been vested by one person in another, that the exercise of a *discretionary* authority cannot be delegated (*delegatus non potest delegare*).

In the absence of proof of a contrary intent in the creation of the power, this principle is in general applicable to powers of all sorts, not "coupled with an interest," except in the case of a "*power coupled with a trust*," in which case there is *no discretion* vested in the donee, but the exercise of the power is *imperative*, as has just been shown.¹

In general, since the gift of a power implies a *personal* trust and confidence, it cannot be transferred or delegated to another, unless a right of transfer or delegation is expressly conferred or necessarily implied.² Thus, the donee of a *special* power cannot exercise it by appointing to another a *life estate*, with power to such life tenant to appoint *in remainder*.³

But this principle has no application to cases where there is *no discretion*, on the one side, or, upon the other, where there is *no relation of trust or confidence*. Hence, a power *in the nature of a trust*,—an imperative power, admitting of no discretion in the donee,—whether given to the donee personally, or as trustee or executor, will be enforced in equity, if the donee, or one of the donees, refuses to execute it, or dies without having done so, or in any other case of its nonexecution.⁴

151; *Walsh v. Wallinger*, 2 Russ. & M. 78; *Kennedy v. Kingston*, 2 Jac. & W. 431. See post, § 1336.

1. Ante, § 1330.

2. 1 *Tiffany*, Real Prop., § 282; *Sugden*, Powers, 179; 4 *Kent*, Com. 327; *Ingram v. Ingram*, 2 Atk. 88; *Hood v. Haden*, 82 Va. 588; *Shelton v. Homer*, 5 Met. (Mass.) 462; *Kerin v. Lindley*, 54 N. J. Eq. 418; *Phillips v. Brown*, 16 R. I. 279; *Wilson v. Mason*, 158 Ill. 304, 313; *Saunders v. Webber*, 39 Cal. 287.

3. *Hood v. Haden*, 82 Va. 588; *Wickersham v. Savage*, 58 Penn. St. 365.

4. Ante, § 1330; *Brown v. Higgs*, 8 Ves. 561; *Gibbs v. Marsh*, 2 Met. (Mass.) 243; *Greenough v. Welles*, 10 Cush. (Mass.) 571; *Franklin v. Osgood*, 14 Johns. (N. Y.) 527; *Gosson v. Ladd*, 77 Ala. 223; *Dick v. Harby*, 48 S. C. 516; *Robertson v. Gaines*, 2 Humph. (Tenn.) 367.

(1479)

On the other hand, if the power is *general*, unrestricted as to the beneficiaries and the manner of its exercise, since there is *no relation of trust or confidence* established, and the power is equivalent to *ownership*, the donee may delegate the exercise of it, or may appoint to such uses as another shall appoint.⁵

Still another exception, or apparent exception, to the principle that the right to exercise a power cannot be delegated arises in the case of power conferred upon trustees, executors, or other fiduciaries, in their *official*, and not in their *personal*, capacities. This exception, if such it may be called, is grounded in the *intention* of the creator of the power, and is based upon the fact that, in such cases, the trust or confidence is reposed in the *official*, and not in the *person*; and his *successor in office* has the same claim to be trusted and to execute the power as had the official to whom it was originally given. Hence, in case of a power given to a trustee, where it appears from the terms of the instrument creating the power that it is attached to the *official merely*, it may be exercised by a *substituted trustee* in the event of the death, resignation or removal of the original trustee.⁶ But if there is a *personal* discretion involved in the exercise of the power, only the original trustee may exercise it, and neither his assignee, heirs, personal representative, nor a substituted trustee can do so, in the absence of statute.⁷

If a *sole* executor, to whom the will gives a power of sale, should refuse to qualify, or should resign or die, the administrator *c. t. a.*, in the absence of an intent to the contrary, or of a

5. 1 Tiffany, Real Prop., § 282; Sugden, Powers, 181, 195. See *Coats v. L. & N. R. Co.*, 13 Ky. Law Rep. 557, 17 S. W. 564; *Dillard v. Dillard* (Va.), 21 S. E. 669.

6. 1 Tiffany, Real Prop., § 282; 2 Perry, Trusts, § 503; *Bradford v. Monks*, 132 Mass. 405; *Boutelle v. Bank*, 17 R. I. 781; *Druid Park Co. v. Oettinger*, 53 Md. 546; *Safe Deposit & Trust Co. v. Sutro*, 75 Md. 361; *Freeman v. Prendergast*, 94 Ga. 369. See, also, post, § 1332.

7. 1 Tiffany, Real Prop., § 282; *Cole v. Wade*, 16 Ves. 27; *Gosson v. Ladd*, 77 Ala. 223; *Young v. Young*, 97 N. C. 132; *Gambell v. Trippe*, 75 Md. 252; *Security Co. v. Snow*, 70 Conn. 288. See *Dillard v. Dillard*, 97 Va. 442, 34 S. E. 60.

statute authorizing it, cannot exercise the power.⁸ In Virginia, however, there is such a statute.⁹

§ 1332. Same—4. Exercise of Powers in Case of Several Joint Donees.

In general, the assumption of the law is that when a power is given to *several donees jointly*, it is the donor's intention to repose his confidence in them *all jointly*, and not to trust to the individual discretion of each or to that of any less than the *whole* number. Hence, unless a contrary intent is shown by the instrument creating the power, or it is otherwise declared by statute, the general rule is that where a "*bare*" or "*naked*" power is given to two or more donees jointly, they must *all unite* in the exercise thereof;¹ and the death or refusal of one or more of the donees to act will prevent the valid exercise of the power.²

But if the power, though "*naked*," be given to persons in an *official* capacity, rather than *personally*, as in the case of a power

8. 1 Tiffany, Real Prop., § 282; 2 Perry, Trusts, § 500; In re Clay, 16 Ch. Div. 3; Tainter v. Clark, 13 Met. (Mass.) 220; Conklin v. Egerton, 21 Wend. (N. Y.) 429. In the case of a devise of land to the executor to be sold, etc., the executor takes an interest in the land, not a mere power of sale, and he takes it as a *trustee*, and not as an *executor*. Mosby v. Mosby, 9 Gratt. (Va.) 590, 611; Jones v. Hobson, 2 Rand. (Va.) 483, 498, 501; Hayes v. Goode, 7 Leigh (Va.) 498; Boyd v. Boyd, 3 Gratt. 114.

9. Va. Code, 1904, § 2663. See Mosby v. Mosby, 9 Gratt. (Va.) 584.

1. 1 Tiffany, Real Prop., § 282; 1 Perry, Trusts, § 294; 2 Story, Eq. Jur., § 1062; McRae v. Farrow, 4 Hen. & M. (Va.) 444; Deneale v. Morgan, 5 Call (Va.) 407; Union Bank v. Beirne, 1 Gratt. (Va.) 226; Bank of U. S. v. Beirne, 1 Gratt. 539; Johnston v. Thompson, 5 Call 248.

2. 1 Tiffany, Real Prop., § 282; 2 Perry, Trusts, §§ 499, 505. See Virginia cases cited *supra*, note 1. See, also, Lane v. Debenham, 11 Hare, 188; Peter v. Beverley, 10 Pet. 532, 564; Parker v. Sears, 117 Mass. 513; Tainter v. Clark, 13 Met. (Mass.) 220; Osgood v. Franklin, 14 Johns. (N. Y.) 527; Conklin v. Egerton, 21 Wend. (N. Y.) 430; Robinson v. Allison, 74 Ala. 254; Muldrow v. Fox, 2 Dana (Ky.) 79; Gray v. Lynch, 8 Gill (Md.) 403; Gutman v. Buckler, 69 Md. 7.

(1481)

of sale given to joint executors, it seems that the power may be exercised by less than the whole number, if some of them die, or refuse to qualify.³ And in Virginia, it is so provided by statute in case of a *refusal to qualify* on the part of one or more of the executors.⁴

On the other hand, if the power is not a "bare" or "naked" power, but one "*coupled with an interest*"⁵ (that is, when the power is conferred upon persons who are also given the title, as in the case of land *devised to trustees or executors*, with a power of sale), since, upon the death of one of the joint tenants of the title, the estate at common law survives, so also does the power.⁶ And in Virginia, it will be remembered, while survivorship between joint tenants in general is abolished by statute, an express exception is made in the case of *joint trustees* and *joint executors*.⁷

Indeed, in case of powers *coupled with an interest*, not only is it permissible for less than the whole number of donees, trustees or executors to exercise the power upon the *death* of one or more of them, but an exercise of the power by the rest of the number is equally permissible where one (or more) refuses to qualify, is removed, or resigns.⁸

3. 1 Tiffany, Real Prop., § 282; Sugden, Powers, 128; Howell v. Barnes, Cro. (Car.), 382; Davis v. Christian, 15 Gratt. (Va.) 11; Nelson v. Carrington, 4 Munf. (Va.) 332, 6 Am. Dec. 519; Peter v. Beverley, 10 Pet. 532, 564; Bradford v. Monks, 132 Mass. 405; In re Murphy's Estate, 184 Penn. St. 310; Fitzgerald v. Standish, 102 Tenn. 383; Weimar v. Fath, 43 N. J. L. 1. But see Jones v. Hobson, 2 Rand. (Va.) 499.

4. Va. Code, 1904, § 2663. See Brown v. Armistead, 6 Rand. (Va.) 594; Miller v. Jones, 9 Gratt. (Va.) 584.

5. Ante, § 1317.

6. See authorities cited *supra*, note 2. See, also, Deneale v. Morgan, 5 Call (Va.) 407; Gould v. Mather, 104 Mass. 283; Wilder v. Ranney, 95 N. Y. 7; Wilson v. Mason, 158 Ill. 304, 49 Am. St. Rep. 162.

7. Va. Code, 1904, §§ 2430, 2431, 2663; ante, § 893.

8. 1 Tiffany, Real Prop., § 282; Warden v. Richards, 11 Gray (Mass.) 277; Gould v. Mather, 104 Mass. 283; Weimar v. Fath, 43 N. J. L. 1; Denton v. Clark, 36 N. J. Eq. 534; Meaklings v. Cromwell, 5 (1482)

But if *all* the executors refuse to qualify, resign, die, or are removed, the administrator *c. t. a.* is not at common law permitted to exercise the power in their stead; though it is otherwise in the case of the substitution of one set of *trustees* by another,—at least, when the confidence has been reposed in them *officially*, and *not personally*.⁹

This defect, however, in case of *executors*, seems to have been now rectified in Virginia by statute providing that “Real estate devised to be sold shall, if no person other than the executors be appointed for the purpose, be sold and conveyed, and rents and profits of any real estate which executors are authorized by the will to receive shall be received, by the *executors who qualify* or the *survivor* of them. If *none qualify*, or those qualifying *die* or are *removed* before the trust is executed or completed, the *administrator with the will annexed* shall sell or convey the lands so devised to be sold, and receive the proceeds of sale, or the rents and profits aforesaid, as an executor might have done.”¹⁰

§ 1333. Same—5. Manner of Exercising the Power.

It is a general rule that all the forms and circumstances prescribed by the instrument creating the power must be strictly

N. Y. 136; *Heron v. Hoffner*, 3 Rawle (Penn.) 393; *Chanet v. Villeponteaux*, 3 McCord (S. C.) 29; *Wolfe v. Hines*, 93 Ga. 329. This is expressly provided in Virginia by statute, in case of the refusal of one or more of the *executors* to qualify. Va. Code, 1904, § 2663.

9. Ante, § 1331.

10. Va. Code, 1904, § 2663. See *Mosby v. Mosby*, 9 Gratt. (Va.) 584, 590; *Carrington v. Goddin*, 13 Gratt. 587; *Davis v. Christian*, 15 Gratt. 11. This statute seems to embrace every case save the *resignation or renunciation* of the executorship by *all* the executors. It may perhaps be doubtful whether the statute applies only where the *title* to the land is devised to the executors, accompanied by a power of sale (a power *coupled with an interest*), or only where there is a *naked* power of sale (without title to the land) conferred upon the executors, or to both. It would seem, however, from the use of the words ‘before the *trust* is executed or completed’ that it is intended at least to apply to the case of a power *coupled with an interest*, if not to both. See *Mosby v. Mosby*, *supra*.

(1483)

observed, including whatever limitations may exist as to the time of execution, the mode of execution, the persons who are to exercise the power, the persons who are to take, and the shares to be allotted to them severally.¹

Thus, though the execution of powers defective in merely *formal* points may sometimes be aided in a court of *equity*,² yet in a court of *law* if the particular instrument whereby the power is to be executed is specified it must be adopted; so that, if a *deed* be required, a *will* does not suffice; and if a will is prescribed, the execution of the power by deed is void, unless the deed is in its nature *testamentary*, in which event the mere fact that it is in the form of a deed will not invalidate it.³

On the other hand, nothing need be added to the requirements. Hence, if a writing under *hand and seal* is required, it need not be delivered; and if required to be “duly attested,” it suffices if there be one witness.⁴

So, independently of statute, whatever number of witnesses be required, that number must be had, although exceeding the limit usually necessary; and in like manner, if a less number be required by the instrument creating the power, a less number will suffice. But if the power is to be executed “*by will*” (without more) the rule is that the will must be made as the statute of Wills requires;⁵ and if the instrument creating the power con-

1. 2 Min. Insts. 818, 819; 2 Th. Co. Lit. 587, n. (B); *Union Bank v. Beirne*, 1 Gratt. (Va.) 226; *Bank of U. S. v. Beirne*, 1 Gratt. 539; *Stainback v. Bank*, 11 Gratt. 281; *Steele v. Livesay*, 11 Gratt. 454; *Raper v. Saunders*, 21 Gratt. 60; *Hood v. Haden*, 82 Va. 592; *Reusens v. Lawson*, 91 Va. 226, 21 S. E. 347.

2. Post, § 1338.

3. 2 Min. Insts. 819; 2 Th. Co. Lit. 587, n. (B); *Williamson v. Beckham*, 8 Leigh (Va.) 23; *Pollock v. Glassell*, 2 Gratt. (Va.) 439; *Hume v. Hord*, 5 Gratt. 374; *Freeman v. Eacho*, 79 Va. 43; *Hood v. Haden*, 82 Va. 588; *Gaskins v. Finks*, 90 Va. 384, 19 S. E. 166.

4. 2 Min. Insts. 819; 2 Th. Co. Lit. 588, n. (B); *Pollock v. Glassell*, 2 Gratt. (Va.) 439; *Thorndike v. Reynolds*, 22 Gratt. 21; *Sherman v. Hicks*, 14 Gratt. 96.

5. 2 Min. Insts. 819; 2 Th. Co. Lit. 588, n. (B); *Longford v. Eyre*, 1 P. Wms. 700.

(1484)

tains no restrictions, express or implied, upon the mode of execution, it may be exercised by any instrument sufficiently showing an intent to execute it, provided at least it would suffice to pass title to the property if it belonged to the donee of the power.⁶

But in Virginia it is provided by statute that in all appointments to be *made by will*, the will must be executed as the statute of Wills, and not as the power may require, *except the will of a married woman*, which must conform, it seems, to the power if that require additional witnesses or ceremonies, but must always conform also to the statute.⁷

It is noteworthy, that a will made in execution of a power not only so operates, but has in most respects the qualities of a proper will. Thus, it is ambulatory until the testator's death, and may be revoked, as, of course, without reserving a power of revocation, as is necessary where the power is executed by deed. So the appointment lapses by appointee's death in testator's lifetime (unless where a statute may prevent),⁸ and confers no interest in any case except *from his death*.⁹

The instrument by which the power is executed need not recite the power, and it will be good although it includes other subjects, the property of the appointor. And notwithstanding

6. Knight v. Yarborough, 4 Rand. (Va.) 566; Cueman v. Broadnax, 37 N. J. L. 508; Christy v. Pulliam, 17 Ill. 59; Sugden, Powers, 203; 2 Min. Insts. 819.

7. Va. Code, 1904, § 2515. See Thorndike v. Reynolds, 22 Gratt. (Va.) 21, 27, 28.

8. See Va. Code, 1904, § 2523; ante, § 1279. The Virginia statute, giving estate to the issue of a dead devisee would seem to apply to wills in the exercise of a power of appointment, in view of the statutory interpretation of the word "will." Va. Code, 1904, § 2511; ante, § 1239, note 2.

9. 2 Min. Insts. 820; 2 Th. Co. Lit. 588, 589, n. (B). But if one by will gives a donee power to appoint, the donee may exercise the power *in the lifetime of the testator who created the power*, and such exercise will be valid to pass the estate at the death of the donor, if his will remains unrevoked. Thorndike v. Reynolds, 22 Gratt. (Va.) 27, 28.

the power may have contemplated but one instrument, yet if several be employed, which in effect are but one, it suffices.¹⁰

§ 1334. Same—6. The Exercise of a Power is a Question of the Donee's Intention.

It is not essential at common law that the donee of the power, in executing it, should recite the power or refer to it in any manner, provided there be an actual or legal *intent to exercise it*. Such an intent may, at common law, be shown in three ways, —either (1) by *specific reference to the power* itself; (2) by *specific reference to the property* which is the subject of the power; or (3) by reason of the fact that the donee's act would be *ineffectual* unless considered as an exercise of the power.¹

Thus, if the donee of a *naked power* over certain land conveys or devises the *specific land*, since he has no estate in the land upon which the conveyance or devise may operate, it must be regarded as intended as an exercise of the power, for else it could have no operation at all.² And even though the donee *have an estate* in the land, if the interest given under the execution of the power be *greater*, this points to the donee having in mind the exercise of the power, which, it seems, will be *conclusively* presumed, though in fact the donee believes he is conveying or devising *his own* property, and is not aware that he has a *power* merely to dispose of the greater estate.³ Thus, the con-

10. Post, § 1334; 2 Min. Insts. 820; 2 Th. Co. Lit. 589, n. (B); Walke v. Moore, 95 Va. 735, 736, 30 S. E. 374.

1. Walke v. Moore, 95 Va. 735, 736, 30 S. E. 374; Hood v. Haden, 82 Va. 594; Lee v. Simpson, 134 U. S. 572, 590; Den v. Roake, 6 Bing. 475.

2. 1 Tiffany, Real Prop., § 283; Sugden, Powers, 289, 290; Clere's Case, 6 Co. 17b; Scrope's Case, 10 Co. 143b; Hood v. Haden, 82 Va. 588; Taylor v. Eatman, 92 N. C. 601; Scott v. Bryan, 194 Penn. St. 41; Matthews v. McDade, 72 Ala. 377; Terry v. Rodahan, 79 Ga. 278, 11 Am. St. Rep. 420; Dick v. Harby, 48 S. C. 516.

3. 1 Tiffany, Real Prop., § 283; Sugden, Powers, 348; Walke v. Moore, 95 Va. 736, 30 S. E. 374; Hood v. Haden, 82 Va. 594; Allison v. Kurtz, 2 Watts (Penn.) 185; Drusadow v. Wilde, 63 Penn. St. 172; Terry v. Rodahan, 79 Ga. 278, 11 Am. St. Rep. 420; Young v. Mutual (1486)

veyance of a *fee* by one who has a life estate, with power over the fee, is an exercise of the power.⁴ But if the interest disposed of is *no greater* than the estate the donee of the power has in the land itself, the general presumption is that his transfer is intended to operate upon his own interest, and not under the power.⁵

If the donee's conveyance or devise does not refer specifically either to the power or to the particular land, but uses *general expressions* descriptive of land or interests therein, which may or may not embrace the land subject to the power, such as "all my land," "all the residue of my land," "my leasehold property," etc., and the donee of the power *owns* no interest in land to which such expressions can refer, his conveyance or will must be regarded as intended to be an exercise of the power, since otherwise it would be *ineffectual* and a mere nullity.⁶ But if the donee *owns other interests in lands* to which these expressions may be held to refer, the better rule, independently of statute, is that such a general conveyance or devise does not show an intent to execute the power, and will be confined in its operation to the interests *actually owned* by the donee.⁷

Ins. Co., 101 Tenn. 311; Bishop *v.* Remple, 11 Ohio St. 282; Yates *v.* Clark, 56 Miss. 212; Baird *v.* Boucher, 60 Miss. 326; Gingrat *v.* Gas Light Co., 82 Ala. 596; Farlow *v.* Farlow, 83 Md. 118; Owen *v.* Ellis, 64 Mo. 77; Warner *v.* Conn. Mut. Life Ins. Co., 109 U. S. 357.

4. Walke *v.* Moore, 95 Va. 729, 30 S. E. 374; Warner *v.* Conn. Mut. Life Ins. Co., 109 U. S. 357; Gingrat *v.* Gas Light Co., 82 Ala. 596; Guarantee, etc., Co. *v.* Jones, 103 Tenn. 245; Baird *v.* Boucher, 60 Miss. 326.

5. 1 Tiffany, Real Prop., § 283; Clere's Case, 6 Co. 17b; Den *v.* Roake, 6 Bing. 475; Walke *v.* Moore, 95 Va. 739, 30 S. E. 374; Robens *v.* Marlott, 136 Penn. St. 35; Mutual Life Ins. Co. *v.* Shipman, 119 N. Y. 324; Phillips *v.* Brown, 16 R. I. 279; Payne *v.* Johnson, 95 Ky. 175; Towles *v.* Fisher, 77 N. C. 437.

6. 1 Tiffany, Real Prop., § 283; Sugden, Powers, 318; Standen *v.* Standen, 2 Ves. Jr. 589; Grant *v.* Lyman, 4 Russ. 292; Keefer *v.* Schwartz, 47 Penn. St. 503; Morry *v.* Michael, 18 Md. 227; Smith *v.* Curtis, 29 N. J. L. 352. See Machir *v.* Funk, 90 Va. 287, 18 S. E. 197.

7. 1 Tiffany, Real Prop., § 283; Sugden, Powers, 312; Den *v.* Roake, 6 Bing. 475; Bingham's Appeal, 64 Penn. St. 345; Mason *v.* Wheeler, (1487)

In Virginia, however, so far as relates to a *devise* by the donee, by statute adopted from the English Wills Act,⁸ it is provided that "A *devise* or bequest shall extend to *any real* or personal estate (as the case may be) which the testator has power to *appoint as he may think proper*, and to which it would apply if the estate were *his own* property, and shall operate as an *execution of such power*, unless a contrary intention shall appear by the will."⁹

It will be observed that this statute applies only where the power is a *general* power, and where the donee undertakes to exercise it *by will*; so that if the power be *special*, either as to appointees, estate, conditions and purposes, or perhaps as to mode of execution, or if the execution of the power actually is by *deed* or otherwise than by will, the common law rule of interpretation applies.

§ 1335. Same—Time of Exercise of Power.

The construction of the original instrument creating the power will usually determine whether *time* is to be regarded as *of the essence* of the power; the general rule being that, if the power is *already existing*, its exercise is valid, though taking place beyond the time fixed for its exercise, the provision as to the time within which the power is to be exercised being usually regarded as *directory only*, and not mandatory. Such, at least, is the general rule in case of powers *coupled with an interest*, as where a power of sale is conferred upon trustees, or where land is devised to executors with power to sell.¹

19 R. I. 21; *Cotting v. De Sartiges*, 17 R. I. 668; *Sewall v. Wilmer*, 132 Mass. 131; *Hallister v. Shaw*, 46 Conn. 248; *Meeker v. Breintnall*, 38 N. J. Eq. 345; *Patterson v. Wilson*, 64 Md. 193; *Bilderback v. Boyce*, 14 S. C. 528.

8. 1 Vict., c. 26, § 27.

9. Va. Code, 1904, § 2526. The effect of this statute seems to be to shift the *onus probandi*. See *Machir v. Funk*, 90 Va. 287, 288, 18 S. E. 197.

1. 1 *Tiffany*, Real Prop., § 284; *Pearce v. Gardner*, 10 Hare, 287; *Jackson v. Ligon*, 3 Leigh (Va.) 161; *Hale v. Hale*, 137 Mass. 168; (1488)

On the other hand, if the instrument creating the power provides that it is not to come into existence until some future event, and such future event has not yet transpired when the power is exercised, the *premature* exercise thereof is at least inoperative until the happening of such future event, if not totally void.²

Upon this principle, if a power to sell land in which another has a *life estate* be given to a trustee or executor, the power cannot be validly exercised in the lifetime of the life tenant, unless all the parties interested are *sui juris* and *consent* thereto, and not even then unless this is consistent with the substantial purpose of the donor of the power.³ But if the power given be to

Mott v. Ackerman, 92 N. Y. 539; Marsh v. Love, 42 N. J. Eq. 112; Sholter's Appeal, 43 Penn. St. 83, 82 Am. Dec. 552. But see Daly v. James, 8 Wheat. 495. It may sometimes be exercised under the direction of a court of equity after the death of the donee of the power. See Faulkner v. Davis, 18 Gratt. (Va.) 651, 98 Am. Dec. 698.

2. Jackson v. Ligon, 3 Leigh (Va.) 161; Raper v. Sanders, 21 Gratt. (Va.) 60; Thorndike v. Reynolds, 22 Gratt. 27, 28; Machir v. Funk, 90 Va. 289, 18 S. E. 197; Loomis v. McClintock, 10 Watts (Penn.) 274; Booraem v. Wells, 19 N. J. Eq. 87; Want v. Stallibrass, L. R. 8 Exch. 175. Thus, where a husband by his will gives land to his wife until she marries again, and in the event of her remarriage gives his executor power to sell the land, the exercise of the power by the executor, the testator's widow remaining unmarried, is ineffectual and void. Raper v. Sanders, *supra*. In Thorndike v. Reynolds, *supra*, it was held that, when one makes a will conferring a power of appointment on another, to be exercised by the latter's *will*, if the donee of the power dies during the lifetime of the donor, having executed the power, it is effectual to pass the estate *upon the subsequent death of the donor*, his will being *unrevoked* in the meantime.

3. 1 Tiffany, Real Prop., § 284; Sugden, Powers, 266; Want v. Stallibrass, L. R. 8 Exch. 175; Jackson v. Ligon, 3 Leigh (Va.) 161; Kilpatrick v. Barron, 125 N. Y. 751; Booraem v. Wells, 19 N. J. Eq. 87; Dohoney v. Taylor, 79 Ky. 124. The consent of the *life tenant alone*, even though the time of sale has been postponed solely on his account, is not sufficient, according to the better view. Want v. Stallibrass, L. R. 8 Exch. 175; Jackson v. Ligon, 3 Leigh (Va.) 161; Raper v. Sanders, 21 Gratt. (Va.) 60; Davis v. Howcott, 21 N. C. 460. But see Truell v. Tyson, 21 Beav. 439; Snell v. Snell, 38 N. J. Eq. 119; Hamlin v. Thomas, 126 Penn. St. 20.

(1489)

sell immediately the *remainder* or *reversion* after the life estate (not the *land itself*), it would seem to be exercisable immediately.

§ 1336. V. Exercise of the Power Not in Accordance with Its Terms—1. Effect of Failure to Exercise the Power.

If the power is a *power in the nature of a trust* (or “coupled with a trust”), a failure by the donee to exercise the power is not very material, since the court of equity may itself execute it, or,—what amounts to the same thing,—may treat it as if it were already executed. The only difference between the court’s execution of such a power and the donee’s arises where the power is in favor of a *class* of persons, amongst whom the *donee* has a discretion to select. In such case, while the *donee*, in exercising the power, may exercise the discretion, and, according to his power, either exclude some members of the class altogether or give them smaller portions than others, the *court of equity* (upon the donee’s failure to exercise the power) has no such discretion, and must divide the property among all the members of the class in *equal shares*.¹

Thus, where land is given by a testator to his wife for her life, with power to appoint it at her death to and amongst his children, as she shall deem best, and she makes no appointment, the property is divided in equity *equally* among the children, in pursuance of the trust created by the will.²

In case of a power to appoint among a class, whether the *death* of one or more members of the class, prior to the time fixed for the appointment, *divests* his interest in case of the ulti-

1. Ante, §§ 1320, 1330.

2. 2 Min. Insts. 821; *Harding v. Glyn*, 1 Atk. 469, 2 White & Tud. Lead. Cas. Eq. 685, 687, et seq.; *Pierson v. Garnett*, 2 Bro. Ch. 45; *Brown v. Higgs*, 8 Ves. 561; *Maline v. Keighley*, 2 Ves. Sr. 333, 529; *Parsons v. Baker*, 18 Ves. 476; *Morris v. Owen*, 2 Call (Va.) 520; *Knight v. Yarborough*, Gilm. (Va.) 27; *Mitchell v. Johnson*, 6 Leigh (Va.) 461; *Mishollen v. Rice*, 13 W. Va. 510, 564; *Tomlinson v. Nickell*, 24 W. Va. 148.

(1490)

mate failure to appoint, or whether the interest of each member of the class is so *vested* in him that, upon his premature death, his share will in equity go to his heirs or devisees, seems to turn, as we have seen, upon the question whether the property is by the *original* instrument *expressly and directly given* to the whole class, with power in the donee only to name in *what shares* and *in what manner* the members are to take, or whether the general power is given the donee to appoint to and among the class, nothing to be given to the class itself directly.³

In the last case, the interest does not vest in any particular member of the class until either *he* is selected by the *donee* or the appointment is *thrown into equity* by the donee's failure to appoint. Hence, upon the death of a member of the class before one or the other of these two events, his interest will not go to his heirs or devisees.⁴

But in the first case mentioned, the land being given by the original instrument to the *whole class*, each member takes a *vested* interest immediately which, though subject to be *divested* in whole or in part by the subsequent exercise of the power by the donee, is good and valid unless and until it be so divested. Hence, in this case, upon the death of a member of the class and the ultimate failure of the donee to exercise the power, the court of equity in enforcing the trust will give the heirs or devisees of the deceased member their ancestor's equal portion.⁵

Thus, in *Lambert v. Thwaites*,⁶ where the property was given to A for life, and after his death *to all A's children*, to be divided among them in such shares as A should declare by will, and A did not exercise the power, it was held that the surviving children, and also the devisees of a deceased child, were all entitled in equity to share in the property.

3. Ante, § 1330.

4. Ante, § 1330; *Lambert v. Thwaites*, L. R. 2 Eq. 151; *Kennedy v. Kingston*, 2 Jac. & W. 431; *Walsh v. Wallinger*, 2 Russ. & M. 78.

5. Ante, § 1330; *Lambert v. Thwaites*, L. R. 2 Eq. 151; *Casterton v. Sutherland*, 9 Ves. 445; *Wilson v. Duguid*, 24 Ch. Div. 244; *Rhett v. Mason*, 18 Gratt. (Va.) 541.

6. L. R. 2 Eq. 151.

If the power be *not in the nature of a trust*, that is, if its execution be not imperative or mandatory, but optional with the donee, and he fails to exercise it, the ultimate destination of the property will depend upon whether there are *limitations over in default of appointment*. If there are such limitations over, the beneficiaries named therein are of course entitled to the property according to the terms of the limitations over. But if there is no ulterior disposition of the property in the event of a failure to appoint, as where land is devised to L, for life and then to such uses as she shall appoint, and L makes no appointment, the land *results* to the heir or residuary devisees of the donor of the power.⁷

§ 1337. Same—2. Excessive Exercise of the Power.

An excessive exercise of a power, that is, an exercise which goes beyond the authority of the donee or the scope of the power, can occur only in case of *special* powers, since the very essence of a *general* power is that it is unrestricted and unlimited in its scope.¹

Any restriction imposed upon the donee in respect to the exercise of the power makes the power to that extent a *special* power. Such powers, as we have seen, may be restricted in point of (1) the appointees; (2) the interests or estates to be created; (3) the conditions and purposes of the execution.²

If the donee exceed his authority by appointing to persons none of whom are objects of the power, the power is badly executed, and the exercise is simply *void*: but if the donee combines among the appointees persons who are, as well as those who are not, objects of the power, it will be valid as to the former, if the shares intended for them can be ascertained.³ Thus, where a

7. 2 Min. Insts. 821; 2 Th. Co. Lit. 579, et seq.; Clive's Case, 6 Co. 180; Frazier v. Frazier, 2 Leigh (Va.) 642, 649. See Va. Code, 1904, § 2524.

1. Ante, § 1319.

2. Ante, § 1319, et seq.

3. 1 Tiffany, Real Prop., § 286; Alexander v. Alexander, 2 Ves. Sr. 640; In re Brown's Trusts, L. R. 1 Eq. 74; Sadler v. Pratt, 5 Sim. (1492)

power to appoint among members of a class was exercised by appointing *life estates* to the "members of the class, with *remainders to their children*, the appointments for *life* were regarded as valid, while the remainders were divided among the members of the class.⁴

When the execution is excessive in point of *estate or interest* created by the appointment, the general rule is that while the execution is totally void *at law*, it will be upheld in *equity*, save as to the *excess*. Thus, where a donee who is given power to appoint *for life* (or for years) appoints *in fee* (or for a greater number of years), the appointment will in equity be void as to the *excess only*.⁵

If the execution is excessive in point of *conditions or qualifications* imposed by the donee upon the interests of the appointees, as by postponing the time of vesting, or requiring the appointees to pay money, etc., such conditions or qualifications will be *rejected*, if separable from the exercise of the power, and the appointment will be sustained *free from them*.⁶

§ 1338. Same—3. Defective Exercise of Power—Aided in Equity.

Except in the case of a *power in the nature of a trust*, equity does not attempt to relieve against the *nonexecution* of powers;¹ but against a *defective* execution thereof, which renders the appointment bad *at law*, equity will sometimes give relief in favor of one having an equity superior to the *holder* of the title by

632; *Horwitz v. Norris*, 49 Penn. St. 213; *Cruse v. McKee*, 2 Head. (Tenn.) 1. But see *Varrell v. Wendell*, 20 N. H. 431; *Myers v. Safe Deposit, etc., Co.*, 73 Md. 413; *Little v. Bennett*, 58 N. C. 156.

4. *Horwitz v. Norris*, 49 Penn. St. 213.

5. 2 Min. Insts. 820; 1 *Tiffany, Real Prop.*, § 286; *Sugden, Powers*, 519, 521; *Campbell v. Leach*, *Ambl.* 740.

6. 1 *Tiffany, Real Prop.*, § 286; *Sugden, Powers*, 515, 526; *Sadler v. Pratt*, 5 Sim. 632; *Pepper's Appeal*, 120 Penn. St. 235.

1. Ante, § 1330.

(1493)

compelling the party entitled *in default of appointment* to convey a good title to the appointee.²

Such relief will be given only in favor of (1) appointees who have paid a *valuable consideration*, such as purchasers, lessees, or creditors of the donee;³ or (2) where there is a *meritorious consideration* of love and affection, existing between the donee and appointee, by reason of which the donee is bound to make provision for the appointee, as where the appointee is the wife or legitimate child of the donee (rarely in other cases);⁴ or (3) in favor of a *charity*.⁵

Aside from a *fraudulent* exercise of a power (which will be considered in the following section), the defects in the execution of a power which will be aided in a court of equity are defects of *form only*, not of substance.⁶

Thus, where the instrument creating the power calls for an appointment by an instrument *under seal*, and the seal is omitted, equity will cure the defect;⁷ and so also, where the appointment is made by an instrument having less than the number of witnesses prescribed by the instrument creating the power.⁸

2. 2 Min. Insts. 822; 1 Tiffany, Real Prop., § 287. See *Freeman v. Eacho*, 79 Va. 43, 47; *Exchange Bank v. Knox*, 19 Gratt. (Va.) 739, 740; *Atwood v. Shenandoah V. R. Co.*, 85 Va. 966, 9 S. E. 748; *Thrasher v. Ballard*, 35 W. Va. 524, 14 S. E. 232.

3. 2 Min. Insts. 822; 1 Tiffany, Real Prop., § 287; Sugden, Powers, 533; Williams, Real Prop. 298; *Tollet v. Tollet*, 2 P. Wms. 489, 1 White & Tud. Lead. Cas. Eq. 227, notes; *Mutual Life Ins. Co. v. Everett*, 40 N. J. Eq. 345; *Howard v. Carpenter*, 11 Md. 259; *Beatty v. Clark*, 20 Cal. 11.

4. 2 Min. Insts. 822; 1 Tiffany, Real Prop., § 287; Sugden, Powers, 534; *Fothergill v. Fothergill*, 1 Eq. Cas. Abr. 222, pl. 9; *Morse v. Martin*, 34 Beav. 500; *Porter v. Turner*, 3 S. & R. (Penn.) 108.

5. 1 Tiffany, Real Prop., § 287; Sugden, Powers, 534; *Sayer v. Sayer*, 7 Hare 377; *Piggot v. Penrice*, Finch, Prec. Ch. 471. It may be doubted whether in Virginia a court of equity would render aid in this case, since no especial favor is here shown to charities. Ante, §§ 521, 522, 1087, 1246.

6. 2 Min. Insts. 822; 1 Tiffany, Real Prop., § 287.

7. *Smith v. Ashton*, 1 Ch. Cas. 263; *Freeman v. Eacho*, 79 Va. 43.

8. 2 Min. Insts. 822; 1 Tiffany, Real Prop., § 287; *Wilkes v. Holmes*, (1494)

This last principle, however, so far as appointments *by will* are concerned, must in Virginia be taken in subordination to the statute providing that "No appointment made *by will* in the exercise of any power shall be valid unless the same be so executed that it would be valid for the disposition of the property to which the power applies if it *belonged* to the testator; and *every will* so executed, except the will of a *married woman*, shall be a valid execution of a power of appointment by will, notwithstanding the instrument creating the power expressly required that a will made in execution of such power shall be executed with some additional or other form of execution or solemnity."⁹

Under this statute, therefore, both the terms of the power and of the statute of Wills must, it is believed, be complied with, when the donee of the power is a *married woman*, and equity may relieve against the defect if the witnesses to the married woman's will are fewer than are prescribed by the instrument creating the power (though not if they are less than the number prescribed by the statute of Wills).¹⁰ But if the donee of the power is not a married woman, and the number of witnesses is fewer than required by the instrument creating the power, but sufficient under the statute of Wills, there is no occasion for equity to relieve, since the *statute* above quoted cures the irregularity and on the other hand, if the number of witnesses is sufficient under the power, but insufficient under the statute of Wills, the court of equity *cannot relieve*, for that would be to contravene the statute itself, which expressly declares that "No appointment made by will in the exercise of any power shall be *valid*, unless the same be so executed that it would be valid for the disposition of the property to which the power applies if it belonged to the testator."¹¹

So also, if a power, which should have been executed by *deed*,

⁹ Mod. 485; *Sergeson v. Sealey*, 2 Atk. 412; *Schenck v. Ellingwood*, 3 Edw. Ch. (N. Y.) 175.

⁹. Va. Code, 1904, § 2515.

¹⁰. 2 Min. Insts. 819.

¹¹. Va. Code, 1904, § 2515. See *McBride v. Wilkinson*, 29 Ala. 662; *Smith v. Bowe*, 38 Md. 463; *Infra*, note, 16.

is exercised by *will*, equity will relieve.¹² But if the power is required to be executed by *will*, it cannot in general be exercised by *deed*, for that would be contrary to the intention of the creator of the power, which is to have the donee reserve entire control over its exercise until his *death*, an intention which would be defeated by any other than a *testamentary* instrument.¹³

In equity, even a covenant or agreement to execute a power, if supported by a valuable consideration, and within the statute of Frauds, is regarded as equivalent to an exercise thereof.¹⁴

It is said that equity will relieve also against a defective execution of a power, where there is any *fraud* or *surprise* (accompanied with fraud), or where the donee is prevented by *accident* or *disability* from fully exercising his power.¹⁵

But it will not in general relieve against the defective execution of a *statutory* power, for that would defeat the statutory requirements as to the mode of execution.¹⁶

§ 1339. Same—4. Fraudulent Exercise of Power.

The donee of a *general* power, since he is absolutely unrestricted as to the purposes for which he may exercise it, can never be guilty of a *fraud upon the power*. But the donee of

12. 2 Min. Insts. 822; 2 Th. Co. Lit. 593, n. (B); 1 Tiffany, Real Prop., § 287; Sugden, Powers, 558; Tollet v. Tollet, 2 P. Wms. 489, 1 White & Tud. Lead. Cas. Eq. 227; Sneed v. Sneed, Ambl. 64, Cowp. 264. But see Williamson v. Beckham, 8 Leigh (Va.) 27, 28.

13. 2 Min. Insts. 822; Reid v. Shergold, 10 Ves. 380; Richards v. Chambers, 10 Ves. 586; Lee v. Muggeridge, 1 Ves. & B. 118; Scott v. Davis, 4 My. & Cr. 90; Williamson v. Beckham, 8 Leigh (Va.) 25, et seq.; Gaskins v. Finks, 90 Va. 384, 19 S. E. 166; Methodist Ep. Church v. Jaques, 3 Johns. Ch. (N. Y.) 114; Ewing v. Smith, 3 Dessaus. (S. C.) 417.

14. 1 Tiffany, Real Prop., § 287; Sugden, Powers, 550; Clifford v. Burlington, 2 Vern. 379; Fothergill v. Fothergill, 1 Eq. Cas. Abr. 222, pl. 9; Shannon v. Bradstreet, 1 Sch. & Lefr. 52; Blore v. Sutton, 3 Meriv. 237; Howard v. Carpenter, 11 Md. 259. See Johnson v. Touchet, 37 L. J. Ch. 25.

15. 2 Min. Insts. 822.

16. 1 Tiffany, Real Prop., § 287; McBride v. Wilkinson, 29 Ala. 662; Smith v. Bowe, 38 Md. 463. (1496)

a *special* power is usually given the power for some particular purposes or reasons, and if he exercises it in a particular way for some ulterior purpose or reason of his own, not within the contemplation of the donor of the power, as for his own pecuniary profit where this is not contemplated, this constitutes a *fraudulent execution* against which equity will relieve in favor of those defrauded thereby.¹

Thus, it is a fraud upon the power for a father having a power of appointment among his children to appoint to a child in bad health and likely to die, in order that *he himself* may inherit;² or for a father to appoint to a son in order that he may act as *bail* for the father.³

But where there is no design of ulterior profit to the donee, not contemplated in the original creation of the power, an appointment made because of mere *prejudice* in favor of or against certain members of the class is not a fraud upon the power, and cannot be set aside.⁴

§ 1340. VI. The Extinction or Suspension of Powers—Discussion Outlined.

Powers may be extinguished, or at least suspended, in five cases: (1) Where the power has been finally and fully *exercised*, so that the entire interest to be appointed has been vested in appointees; (2) Where the *purposes* for which the power is to be exercised have ceased to exist; (3) Where a *condition precedent* to the exercise of the power fails of occurrence; (4) Where the donee of the power is *estopped* to exercise it because its exercise

1. 2 Min. Insts. 822; 1 Tiffany, Real Prop., § 289; Duke of Portland v. Topham, 11 H. L. Cas. 32; Trout v. Pratt, 106 Va. 441, 56 S. E. 165; Stocker v. Foster, 178 Mass. 591; Thompson v. Norris, 20 N. J. Eq. 489; Degman v. Degman, 98 Ky. 717; Holt v. Hogan, 58 N. C. 82.

2. Wellesley v. Mornington, 2 Kay & J. 143.

3. Bostick v. Winston, 1 Sneed (Tenn.) 524.

4. 1 Tiffany, Real Prop., § 289; Topham v. Duke of Portland, 5 Ch. App. 57. See Hill v. Jones, 65 Ala. 214; Hamilton v. Ins. Co., 6 Lea (Tenn.) 402.

would work a fraud upon innocent parties; and (5) Where the power is *released* by the donee.

These will be considered in their order.

§ 1341. Same—1. Final and Complete Exercise of the Power.

The execution of a power in its entirety may be accomplished by a single act, or it may be capable of accomplishment by several successive, but partial, acts, as where the donee of a general power appoints an estate for life at one time, and a fee simple at another.¹

But in any event, so soon as the entire interest in the whole property subject to the power has been given out to appointees, the power is thenceforth *extinguished* for want of an interest upon which to operate.²

§ 1342. Same—2. Cessation of Purposes for Which Power Was Created.

If the purposes for which the power was created cease to exist, the power ceases to exist also. Thus, in case of a power to sell for purposes of *division*, if the persons entitled agree to a division without sale, the power of sale is extinguished.¹

So also, in the case of a power to sell in order to obtain funds for the use or support of a particular person, the power ceases upon the *death* of such person.² And so, a power of sale given to a trustee will cease with the termination of the trust, unless a contrary intention appear.³ But a

1. Sugden, Powers, 272.

2. 1 Tiffany, Real Prop., § 291; *Ex parte Elliott*, 5 Whart. (Penn.) 524; *Asay v. Hoover*, 5 Penn. St. 21; *Fritsch v. Klansing*, 11 Ky. L. Rep. 788, 13 S. W. 241.

1. 1 Tiffany, Real Prop., § 291; *Chase v. Gowdy*, 43 N. J. Eq. 95; *Wooster v. Cooper*, 59 N. J. Eq. 204. See *Carney v. Kain*, 40 W. Va. 758, 23 S. E. 650.

2. *Fidler v. Lash*, 125 Penn. St. 87; *Jackson v. Jansen*, 6 Johns. (N. Y.) 73; *Ward v. Barrows*, 2 Ohio St. 241.

3. *Heard v. Reade*, 171 Mass. 374; *Bakewell v. Ogden*, 2 Bush. (Ky.) 265.
(1498)

power conferred upon a fiduciary, not in his *fiduciary*, but in a *personal* capacity, is not extinguished because of the subsequent resignation or refusal of the fiduciary to qualify as such.⁴

§ 1343. Same—3. Failure of Condition Precedent to the Exercise of the Power.

This cause of the extinguishment of powers has already been considered,¹ and it is unnecessary to repeat or enlarge upon that discussion. An illustration of the principle arises where a power is dependent for its exercise upon the previously obtained assent of a third person, and such person dies without having assented.²

§ 1344. Same—4. Donee Estopped to Exercise the Power.

When the donee of a power, by his own acts in connection with the land to which the power applies, has placed innocent third parties in a position to be injured or defrauded by his exercise of the power, the power is thereby extinguished, or at least suspended until the danger of such injury be past.

Such a case occurs where the power is coupled with an interest or estate in the land, and the power is to be exercised *during the continuance* of the donee's estate or interest. In such case the power is denominated a power "*appendant*" or "*appurtenant*," because it is annexed to the estate in the land. Here the donee has his choice, in aliening the land, whether he shall aliene by virtue of his *ownership* (to the extent of his interest) or whether he shall aliene by virtue of the *power* conferred upon him. If he chooses to aliene his interest (by virtue of his *ownership*) his right to exercise the *power* in favor of another is *extinguished* or *suspended* during the continuance of the estate first transferred by him, since otherwise the prior alienees would be de-

4. Trout v. Pratt, 106 Va. 431, 56 S. E. 165.

1. Ante, § 1322.

2. 1 Tiffany, Real Prop., § 291; Sugden, Powers, 252; Kissam v. Dierkes, 49 N. Y. 602; Piersol v. Roop, 56 N. J. Eq. 739; Pawles v. Jordan, 62 Md. 499. But see Leeds v. Wakefield, 10 Gray (Mass.) 514.

prived of their interest by the subsequent exercise of the power, which would constitute a fraud upon them.¹

Thus, if a tenant in fee has power to appoint to others in fee, or a tenant for life has power to grant leases in possession or to place a rent charge or mortgage upon the land, an alienation of his *estate* or part thereof by the donee will generally extinguish or suspend the power, so that he cannot thereafter, *in derogation of his grant* to the alienees, exercise the power.²

But such extinguishment or suspension, it will be observed, takes place only in case the exercise of the power is *in derogation* of the donee's previous grant of an interest issuing out of his own estate in the land. Hence, one who has a life estate, with power to appoint the fee, though he alienes his life estate, may thereafter appoint in fee, if he *reserved* this right in his conveyance, or if the assignee of his life estate assents thereto.³

So also, if the power, though coupled with an interest or estate in the land, is to be exercised, or the appointment is to take effect, only after the *termination* of the donee's estate, or of the *interest conveyed by him*, his alienation of his estate or part thereof does not extinguish nor suspend the power, since in no event can it take effect *in derogation of the preceding grant*.

Thus, the power is not extinguished by the donee's alienation of his interest, where the donee is tenant *for life*, with power to appoint to his children *after his death*,⁴ or with power to make a lease for thirty-one years to *commence after his death*, in order to raise portions for children, or to provide a jointure for his wife, after his death.⁵

1. 2 Min. Insts. 816; 1 Tiffany, Real Prop., § 291; Sugden, Powers, 46, 51, 57.

2. 2 Min. Insts. 816; 2 Th. Co. Lit. 124, n. (Q, 3); Grange v. Tining, Bridg. Judg'ts, 115; Armstrong v. Snowden, 61 Md. 364; Brown v. Renshaw, 57 Md. 67.

3. 1 Tiffany, Real Prop., § 291; Alexander v. Mills, 6 Ch. App. 124; Hardaker v. Moorhouse, 26 Ch. Div. 417; Leggett v. Doremus, 25 N. J. Eq. 122.

4. Sugden, Powers, 46, 79; West v. Berney, 1 Russ. & M. 431.

5. 2 Min. Insts. 816.

In such cases, the estate created under the power cannot, in any event, affect the *estate* of the donee of the power, and so the power is said to be *in gross*, as having no connection with the estate (in contradistinction to powers "appendant" or "appurtenant").⁶

In respect to powers *in gross*, it may be observed that if a tenant for life or years, with power of appointment thereafter by *bargain and sale*, disposes of the land *in fee simple*, the power is not thereby extinguished; for since the execution of the power is to take effect beyond the compass of his own estate only, his conveyance, which passes no more than he is entitled to convey,⁷ does not hinder the main use of the power.⁸

It was otherwise, however, at common law, in case of a *tortious* conveyance (fine, recovery, or feoffment with livery) by the tenant, for the entire fee simple is thereby *prima facie* passed, and all the remainders are *prima facie* divested, and thus the power is destroyed, since it cannot be executed but out of the remainders, and the donee has prevented the execution of it by having already disposed of the whole interest to another.⁹ But in Virginia, under the statute providing that "a writing purporting to pass or assure a greater right or interest in real estate than the person making it may lawfully pass or assure, shall operate as an alienation of such right or interest in the said real estate as such person might lawfully convey or assure,"¹⁰ this result would no longer follow.

A fortiori, there is no extinguishment nor suspension of a power, if it be a "*naked*" power, not coupled with any estate or interest in the land on the donee's part, since the donee has no

6. 2 Min. Insts. 816. Such powers are also sometimes called "*collateral*" powers, but the student would do well to eschew the latter phrase, lest he be thereby led to confound such a power as this with a power "*simply collateral*," presently to be mentioned. 2 Min. Insts. 816.

7. Ante, § 210.

8. 2 Min. Insts. 816; Gilbert, Uses, 315.

9. 2 Min. Insts. 817; Gilbert, Uses, 316.

10. Va. Code, 1904, § 2419.

interest to transfer, and hence cannot place alienees in a position to be defrauded. Such a power, in contrast with a power *appendant* or *appurtenant*, on the one side, and with a power *in gross*, on the other, is termed a power "*simply collateral*," and cannot be extinguished or suspended by any act on the part of the donee with respect to the land.¹¹

§ 1345. Same—5. Release of Powers.

A power in *the nature of a trust* cannot be released, by the donee thereof save perhaps to the beneficiaries or members of the class amongst whom the appointment is to be made, nor can powers *simply collateral* be released at common law, except when the power is for the benefit of the donee himself, such as a power to charge the land with a debt for his own benefit.¹

Save in these cases, the general rule of the common law is that a power may be released by the donee thereof to the remainderman, reversioner or person having an immediate estate of *freehold* in the land. This applies whether it be a power *appendant* or *appurtenant* or a power *in gross*.²

A release of a power, when validly made, operates by way of *extinguishment* of the power.³

11. 2 Min. Insts. 817; Gilbert, Uses, 316, 317; Sugden, Powers, 49; *West v. Berney*, 1 Russ. & M. 431.

1. 1 Tiffany, Real Prop., § 291; Sugden, Powers, 49; *West v. Berney*, 1 Russ. & M. 431. This is now altered in England by the Conveyancing Act of 1881 (§ 52) which authorizes any donee of a power to release it by deed or contract not to exercise it.

2. 2 Min. Insts. 817; 2 Washburn, Real Prop. 308, et seq.; Sugden, Powers, 82, et seq.; *Albany's Case*, 1 Co. 110b; *West v. Berney*, 1 Russ. & M. 431; *Smith v. Death*, 5 Madd. 371.

3. 2 Washburn, Real Prop. 308, et seq. See ante, § 1210. (1502)

CHAPTER XLVII.

TITLE BY ESTOPPEL.

§ 1346. Outline of Discussion.

- 1347. I. Transfer of After Acquired Title.
- 1348. 1. Transfer by Feoffment, Fine or Recovery.
- 1349. 2. Transfer by Lease.
- 1350. 3. Transfer by Conveyance Containing Covenants or Representations of Title.
- 1351. II. Transfer of Title by Estoppel Arising from Representations.

§ 1346. Outline of Discussion.

There are two methods in which title to land may pass by estoppel, namely: (1) In case of the transfer of an *after acquired title* by estoppel arising from a conveyance of the land made prior to the acquisition thereof by the grantor; (2) In case of the transfer of title by estoppel arising from an oral or written misrepresentation on the part of the owner of land, whereby an innocent purchaser is misled into purchasing a defective title.

These will be considered in the following sections.

§ 1347. I. Transfer of After Acquired Title.

When one conveys land to which he, at the time, has no title, but subsequently acquires title thereto, such after acquired title sometimes enures by estoppel to the grantee.

We shall examine briefly the following instances of the operation of this principle: (1) Where the prior transfer is by feoffment at common law, fine or recovery; (2) Where it is by lease; and (3) Where it is by a conveyance containing covenants or representations of title.

§ 1348. Same—1. Transfer by Feoffment, Fine or Recovery.

If a grantor, having no title to land, should nevertheless convey it at common law by a *feoffment* with livery, or by a *fine* or
(1503)

common recovery, and should subsequently acquire a title thereto, such feoffment, fine or recovery always operated to transfer to the feoffee, etc., the after acquired title, provided there was contained therein the "*ancient warranty*" or covenant real. In such cases, as we have seen,¹ the warranty had not only the ordinary and personal effect of *rebutting* the claim of the grantor or his heirs to the land under the after acquired title, by virtue of the estoppel of the warranty, but also the much higher operation of actually transferring and passing to the grantee the after acquired estate.²

§ 1349. Same—2. Transfer by Lease.

At common law a lease, made by a person who has *no estate*, or at least no *vested* estate, in the premises, while it can operate nothing immediately, may operate by *estoppel*, in case the lessor should afterwards acquire the land. Thus, if an heir *apparent*, or a contingent remainderman, or one having a contingent interest under an executory devise, or who has no title whatever, makes a lease by *indenture*, and subsequently an estate in the land vests in him, the indenture will at common law operate by way of *estoppel* to entitle the lessee to hold the land for the term of years granted him; and this estoppel, when it becomes effectual and can operate on the interest, will be fed by the interest; and the lease will be regarded as a lease carved out of an actual ownership.¹

A lease operates by way of estoppel upon the maxim, *ut res valcat, magis quam pereat*; and therefore if it *can* operate by way of *passing an interest*, it shall not operate by *estoppel*. Hence, where a lessor possessed of an *interest*, leases an estate which may not endure beyond the period of his own interest,

1. Ante, § 1116.

2. 2 Min. Insts. 710; Rawle, Cov., § 243; 2 Th. Co. Lit. 353, n. (B, 1), 456, 457; Doe v. Oliver, 10 Barn. & Cr. 181; Sturgeon v. Wingfield, 15 Mees. & W. 224; Burtners v. Keran, 24 Gratt. (Va.) 66.

1. 2 Min. Insts. 767; 2 Th. Co. Lit. 415, n. (L); Bac. Abr. Leases (O); Trevivan v. Lawrence, 1 Salk. 276; Doe v. Seaton, 2 Crompt., M. & R. 728.

(1504)

though in fact the leased estate does last the longer, a title subsequently acquired by the lessor will not operate by estoppel to keep alive the leased estate; as where A, lessee for the life of B, makes a lease for twenty years by deed indented, and *afterwards* purchases the reversion in fee, and *B dies*; A shall avoid his own lease, seeing that it takes effect out of A's own original interest (which was terminated by B's death) and therefore did not operate by estoppel.²

§ 1350. Same—3. Transfer by Conveyance Containing Covenants or Representations of Title.

At common law the doctrine of title to after acquired property by estoppel was confined to the four forms of conveyance mentioned in the two preceding sections, and was not applied to such conveyances as a grant, release or bargain and sale.¹

But it is generally admitted that if a conveyance of *any kind* purports to transfer a good title to certain property, whether this appears from *recitals, covenants*, or in any other manner, there is, *in equity* at least, a *personal estoppel* upon the grantor thereafter to deny that such estate has actually passed to the grantee, or to claim the land under a subsequently acquired title as against the grantee, in part to avoid circuitry of action, and in

2. 2 Min. Insts. 767, 768; 2 Th. Co. Lit. 416, n. (L), 432; Wynn v. Harman, 5 Gratt. (Va.) 157. Moreover, a tenant under a lease may acquire by estoppel a right to use the premises in a manner not authorized by the lease, as where the lessor himself suggests a certain use, which suggestion is adopted by the lessee at an additional expense to himself. Pine Beach Co. v. Columbia Co., 106 Va. 814, 56 S. E. 822; Repass v. Richmond, 99 Va. 508, 39 S. E. 160; Greer v. Mitchel, 42 W. Va. 494, 26 S. E. 302; Swain v. Seamens, 9 Wall. 254; Dair v. United States, 16 Wall. 1.

1. Ante, § 1116; 2 Min. Insts. 710; Rawle, Cov., §§ 244, 246, 262; Right v. Bucknell, 2 Barn. & Ad. 278; Doe v. Oliver, 5 M. & R. 202, 2 Smith's Lead. Cas. 511, 514, et seq.; Burtner v. Keran, 24 Gratt. (Va.) 66, 67; Gregory v. Peoples, 80 Va. 357; Reynolds v. Cook, 83 Va. 821, 5 Am. St. Rep. 317, 3 S. E. 710. In some of the states, however, such effect is given to these conveyances, especially if they contain certain covenants for title. Rawle, Cov., § 248.

part on general equitable grounds of good faith and estoppel.²

The distinction between a *personal* estoppel upon the grantor and an estoppel by which the after acquired *title actually passes* seems to be important only where the grantor subsequently conveys the after acquired title to a third person. In such case, if the estoppel be merely upon the *grantor personally*, it would not bind such subsequent purchaser of the after acquired estate, —at least, if he be a purchaser *for value and without notice* of the deed made before the acquisition of the title by the grantor;³

2. Ante, § 1133; 2 Min. Insts. 710; Rawle, Cov., §§ 245, 255; Bigelow, Estoppel, 395; Goodtitle v. Bailey, Cowp. 601; Right v. Bucknell, 2 Barn. & Ad. 278; Van Rensselaer v. Kearney, 11 How. 297; Burtner v. Keran, 24 Gratt. (Va.) 66, 67; Raines v. Walker, 77 Va. 95; Gregory v. Peoples, 80 Va. 357; Reynolds v. Cook, 83 Va. 821, 5 Am. St. Rep. 317, 3 S. E. 710; Nye v. Lovitt, 92 Va. 710, 24 S. E. 345; Townsend v. Outten, 95 Va. 536, 28 S. E. 958; Flanary v. Kane, 102 Va. 549, 566, 46 S. E. 312, 681. Under Va. Code, 1904, § 2502, regulating the conveyances of *married women*, it seems that the clause providing that "such writing shall not operate any further upon the wife or her representatives, by means of any covenant or warranty contained therein, which is not made with reference to her separate estate as a source of credit," as well as the principles of the common law, would prevent the application to her case of the doctrine of transfer of after acquired title by estoppel arising from her prior conveyance. See Lewis v. Apperson, 103 Va. 624, 106 Am. St. Rep. 903, 68 L. R. A. 867; Augusta Nat. Bank v. Beard, 100 Va. 687, 42 S. E. 694. See, also, Nye v. Lovitt, *supra*.

3. In Virginia, it is difficult to ascertain from the decisions just what view is taken of the title by estoppel arising from after acquired title. It would seem that it binds the *land*, not only as between the parties, but as to a subsequent purchaser from the grantor (after acquiring title), that is, it is binding upon the *grantor or his privies*. Reynolds v. Cook, 83 Va. 822, 823, 5 Am. St. Rep. 317, 3 S. E. 710, quoting Van Rensselaer v. Kearney, 11 How. 297; French's Lessee v. Spencer, 21 How. 228.

Another difficult question in Virginia is whether the grantee claiming by estoppel takes a *legal* or only an *equitable* title. If the latter, equitable principles would apply, and the subsequent purchaser above mentioned, in order to be bound by the grantor's conveyance made before he has acquired full legal *title*, must have *notice* thereof; and it would appear that the mere *registry* of such prior deed would not be (1506)

—while if the estoppel operates to pass the after acquired title itself, it is equally as binding upon a purchaser from the grantor, even, it seems, though for value and without notice, as upon the original grantor.⁴

It should be noted, however, that no estoppel occurs, if the conveyance purports to transfer merely such interest as the grantor owns at the date thereof as in case of a quitclaim deed, and the fact that such conveyance contains covenants for title is immaterial.⁵

It should also be observed that the transfer of after acquired title by estoppel on the part of a covenantor supposes that he has acquired the subsequent title on his own account and *not* as a mere trustee, express or indirect, for another. Hence if he buys the subsequent title with another's money, whereby he becomes an implied trustee for him who advances the consideration,⁶ this would not operate to vest such after acquired title in his grantee by estoppel.⁷

§ 1351. II. Transfer of Existing Title by Estoppel Arising from Representations.

It has long been an established and familiar rule in the courts

notice, under the statute providing that a purchaser shall not be affected by the record of a deed made by his grantor before the date of the deed from which such grantor's title is derived. Va. Code, 1904, § 2473; post, § 1411.

In *Gregory v. Peoples*, 80 Va. 357, the transfer of after acquired title by estoppel is said to arise *in equity*, but it was held to be a good defense to an action at law in ejectment in *Reynolds v. Cook*, *supra*. See, also, *Nye v. Lovitt*, 92 Va. 710, 24 S. E. 345.

4. Rawle, Cov., § 259; 2 *Tiffany*, Real Prop., § 456; *Bigelow*, Estoppel, 413, et seq. See *Reynolds v. Cook*, 83 Va. 822, 823, 5 Am. St. Rep. 317, 3 S. E. 710; *Van Rensselaer v. Kearney*, 11 How. 297; *French's Lessee v. Spencer*, 21 How. 228.

5. Rawle, Cov., § 250; *Hanrick v. Patrick*, 119 U. S. 156, 175; *Blanchard v. Brooks*, 12 Pick. (Mass.) 47; *Fay v. Wood*, 65 Mich. 390; *Gibson v. Chauteau*, 39 Mo. 536; *Quincy v. Baker*, 37 Cal. 465.

6. Ante, § 475.

7. 2 Min. Insts. 710, 711; *Gregory v. Peoples*, 80 Va. 357, 358; *Raines v. Walker*, 77 Va. 95. See ante, § 1133.

(1507)

of equity that one who knowingly makes a false representation to another, upon which the latter acts, is bound to make the representation good;¹ and also that one's fraudulent failure to make known one's title to a person about to purchase the land from another, reverses the ordinary rule of priorities, and postpones the former's claim to that of the purchaser.²

Thus, if a person, having title to land, *openly disclaims* any interest therein or *fails to assert* his rights when he should do so, and thereby causes one ignorant of the true state of the title to purchase the land from a third person, he is estopped thereafter,—in equity, at least,—to assert any claim to the land.³ So also, the true owner may be estopped to set up his title against a person who has expended money for improvements on land under the belief that he has a perfect title to the land, if the true owner rests under an *obligation to inform* him of the true condition of the title.⁴

1. Bigelow, Estoppel, 557; Evans v. Bicknell, 6 Ves. 174.

2. 2 Tiffany, Real Prop., § 457; 2 Pomeroy, Eq. Jur., §§ 686, 731. These equitable principles are now, however, generally recognized and enforced in courts of law as well as of equity. 2 Tiffany, Real Prop., § 457. See Pickard v. Sears, 6 Ad. & El. 469.

3. Dickerson v. Colgrove, 100 U. S. 578; Suttle v. Richmond, F. & P. R. R. Co., 76 Va. 284; Chesapeake & O. R. R. Co. v. Walker, 100 Va. 70, 40 S. E. 633, 914; Coogler v. Rogers, 25 Fla. 853; Marines v. Goblet, 31 S. C. 153, 17 Am. St. Rep. 22; Guffey v. O'Reilly, 88 Mo. 418, 57 Am. Rep. 424; Bryan v. Ramirez, 8 Cal. 461, 68 Am. Dec. 340. To constitute an equitable estoppel that will operate to transfer title to property, the party estopped must have been apprised of the true state of his own title, and must have been guilty of fraud, actual or constructive, or of negligence so gross as to imply fraud, and the other party must not only be destitute of all knowledge of the true state of the title, but of any convenient means of acquiring such knowledge; and he must have relied upon the admissions of the party estopped to such an extent as that he will be injured by allowing the truth of them to be disproved. Chesapeake & O. R. R. Co. v. Walker, *supra*.

4. 2 Tiffany, Real Prop., § 457; Kirk v. Hamilton, 102 U. S. 68; Redmond v. Excelsior Sav. Fund Ass'n, 194 Penn. St. 643, 75 Am. St. Rep. 714; Dellett v. Kemble, 23 N. J. Eq. 58; Gibson v. Herriott, 55 Ark. 85, 29 Am. St. Rep. 17. But the mere failure to assert one's (1508)

While perhaps the most general view is that this sort of estoppel may be asserted in a court of *law* as well as in *equity*,⁵ the doctrine in Virginia is that it is not available *at law* when the title to *land* is involved,—at least in case of *oral* misrepresentation, since at law the statute of Conveyances requiring a *deed or will* for the transfer of land,⁶ or the statute of Parol Agreements requiring a contract to convey to be *in writing*,⁷ must control; and that *in equity only* can the case be regarded as taken out of the purview of these statutes by reason of the actual or constructive *fraud* involved in the misrepresentation.⁸

In conclusion, it is worthy of observation that an estoppel of this kind is to be distinguished from the sort discussed in the preceding sections by the fact that since this sort is based upon a representation that one *has not the title*, and not that he has it, it is ineffectual to transfer a title *subsequently acquired* by the party making the misrepresentation.⁹

title, without actual misrepresentation in respect thereto, does not operate an estoppel, if the purchaser has notice of the true owner's title by recordation or otherwise. *Brant v. Virginia Coal & Iron Co.*, 93 U. S. 326, 337; *Clark v. Parsons*, 69 N. H. 147, 76 Am. St. Rep. 157.

5. 2 *Tiffany, Real Prop.*, § 457; *Bigelow, Estoppel*, 715; *Kirk v. Hamilton*, 102 U. S. 68; *Brown v. Bowen*, 30 N. Y. 519; *Beaupland v. McKeen*, 28 Penn. St. 124; *Davis v. Davis*, 26 Cal. 23; *Levy v. Cox*, 22 Fla. 546.

6. Va. Code, 1904, § 2413.

7. Va. Code, 1904, § 2840.

8. *Suttle v. Richmond, F. & P. R. R. Co.*, 76 Va. 284; *Haney v. Breeden*, 100 Va. 781, 42 S. E. 916; *Newport News, etc., Co. v. Lake*, 101 Va. 343, 43 S. E. 566. See, also, *Standifer v. Swann*, 78 Ala. 88; *Hayes v. Livingston*, 34 Mich. 384, 22 Am. Rep. 533.

9. 2 *Tiffany, Real Prop.*, § 457; *Gluckauf v. Reed*, 22 Cal. 468; *Donaldson v. Hibner*, 55 Mo. 492.

(1509)

CHAPTER XLVIII.

TITLE BY DEDICATION.

- § 1352. Outline of Discussion.
- 1353. The Nature of Dedication.
- 1354. The Intention to Dedicate.
- 1355. Acceptance of the Dedication.

§ 1352. Outline of Discussion.

We shall consider this topic under the following heads: (1) The nature of dedication, as a source of title to land; (2) The intention necessary; and (3) The requisite acceptance of the dedicated land by the public.

§ 1353. The Nature of Dedication.

Dedication is a form of transfer of land by which an individual grants to the *public* rights of *user* in his land, as where one dedicates land to the public use for a highway, park, square, cemetery, school or, in some states, for religious or charitable purposes.¹

1. 2 Tiffany, Real Prop., § 421; Elliott, Roads and Streets, c. 5; West Point v. Bland, 106 Va. 792, 56 S. E. 802; Buntin v. Danville, 93 Va. 200, 24 S. E. 830; Newport News, etc., Co. v. Lake, 101 Va. 334, 43 S. E. 566; City of Richmond v. Gallego Mills Co., 102 Va. 165, 45 S. E. 877; (parks and squares), Cincinnati v. White, 6 Pet. 431; Abbott v. Inhabitants, etc., 143 Mass. 521, 58 Am. Rep. 143; State v. Trask, 6 Vt. 355, 27 Am. Dec. 554; (cemeteries), Hunter v. Trustees, 6 Hill (N. Y.) 407; Mowry v. Providence, 10 R. I. 52; Davidson v. Reed, 111 Ill. 167, 53 Am. Rep. 613; (schools), Klinkener v. School Directors, 11 Penn. St. 444; Board of Education v. Edson, 18 Ohio St. 221; Chapman v. Floyd, 68 Ga. 455; Board of Regents, etc., v. Painter, 102 Mo. 464; (charitable and religious purposes), Beatty v. Kurtz, 2 Pet. 566; Hannibal v. Draper, 15 Mo. 634; Williams v. First Presbyterian Church, 1 Ohio St. 478.

In Virginia, a dedication for religious purposes is controlled by statute. Va. Code, 1904, § 1398; ante, § 522; and for charitable purposes, see ante, § 522. But one cannot dedicate land that is *incumbered*, to the prejudice of the mortgagee. Gate City v. Richmond, 97 Va. 337, 33 S. E. 615.

(1510)

A dedication of land to public uses may be made, like any other grant, subject to conditions, reservations or restrictions upon its use by the public. Thus, a highway may be dedicated for use at particular seasons, or for certain purposes, only,² or for use by pedestrians alone or by a certain class of vehicles.³

§ 1354. The Intention to Dedicate.

No special form or ceremony is required for a dedication, and the statute of Frauds, or in Virginia the statute of Conveyances,¹ is not applicable thereto, so that neither deed nor writing is necessary to the validity of a dedication to public uses, the only essential, so far as the grantor is concerned, being clear and unequivocal evidence of an *intention to dedicate*.²

Mere *acquiescence* by the owner in the use of the land by the public does not, standing alone, establish the intention to dedicate it permanently to the public use;³ but such use, especially if long continued, taken in connection with other circumstances, may raise a presumption of such an intention on the part of the owner.⁴

2. *Mercer v. Woodgate*, L. R. 5 Q. B. 26; *Hughes v. Bingham*, 135 N. Y. 347; *Ayres v. Penn. R. Co.*, 52 N. J. L. 405.

3. *Stafford v. Coyney*, 7 Barn. & Cr. 257; *Trustees, etc., v. Hoboken*, 33 N. J. L. 13, 97 Am. Dec. 696.

1. Va. Code, 1904, § 2413.

2. *Lynchburg Traction Co. v. Guill*, 107 Va. 86, 57 S. E. 644; *West Point v. Bland*, 106 Va. 794, 56 S. E. 802; *Buntin v. Danville*, 93 Va. 200, 204, 24 S. E. 830; *Wright v. Tukey*, 3 Cush. (Mass.) 290; *Hall v. McLeod*, 2 Met. (Ky.) 98, 74 Am. Dec. 400; *Godfrey v. Alton*, 12 Ill. 29, 52 Am. Dec. 476.

3. *McKey v. Hyde Park*, 134 U. S. 84; *West Point v. Bland*, 106 Va. 797, 56 S. E. 802; *Gaines v. Merryman*, 95 Va. 660, 29 S. E. 738; *Hayden v. Stone*, 112 Mass. 346; *Weiss v. South Bethlehem*, 136 Penn. St. 294; *Lewis v. Portland*, 25 Or. 133, 42 Am. St. Rep. 777.

4. *Buntin v. Danville*, 93 Va. 200, 204, 24 S. E. 830; *West Point v. Bland*, 106 Va. 797, 56 S. E. 802; *Weiss v. South Bethlehem*, 136 Penn. St. 294; *Chicago v. Railway Co.*, 152 Ill. 561; *New Orleans, etc., R. R. Co. v. Moye*, 39 Miss. 374. On the other hand, however, the intention to dedicate may be rebutted,—in some measure at least,—by proof (1511)

If the owner of land divides it into lots for sale, intersecting it by streets and alleys regularly laid off upon the ground, this constitutes a dedication of the land so occupied by streets to highway uses.⁵

But if the streets are not actually opened up, but only appear on plats or maps, to which reference is made in the deeds to the lots, it is more questionable whether this amounts to a dedication, independently of statutes, though perhaps the weight of authority is in favor of the view that it is at least an *inchoate* dedication, liable to be abrogated by subsequent events, such as abandonment of the project.⁶

In Virginia, a statute provides for the *recording* of maps and plats of land divided into lots to be sold, and expressly declares that the streets and alleys appearing on such plat or map shall be regarded, merely by virtue of the owner's acknowledgment and the recording thereof, as duly dedicated to the public for a right or easement of *passage* over the land occupied by such streets and alleys on the plat, and shall be equivalent to a deed *in fee simple* to such portion thereof as is therein dedicated to charitable, religious, or educational purposes; reserving to the owner, amongst other things, the right to *vacate* such plat, and the public easements and donations growing out of it, at any time *before the sale of any lot* therein, by a *written* instrument declaring the same to be vacated, duly executed, acknowledged or proved, and recorded in the same office with the plat to be

that the owner has continued to pay taxes upon the land. 2 Tiffany, Real Prop., § 422; Bauman v. Boeckeler, 119 Mo. 189; San Leandro v. Le Breton, 72 Cal. 179; Rhodes v. Brightwood, 145 Ind. 21.

5. Elliott, Roads & Streets, §§ 117, 118; 2 Tiffany, Real Prop., § 422; Glasgow v. Mathews, 106 Va. 14, 54 S. E. 991; Norfolk v. Nottingham, 96 Va. 34, 30 S. E. 444; Irwin v. Dixon, 9 How. 10, 31; Trustees, etc., v. Hoboken, 33 N. J. L. 13, 97 Am. Dec. 696; Quicksall v. Philadelphia, 177 Penn. St. 301; Baltimore v. Frick, 82 Md. 77.

6. See authorities cited in the preceding note. But see *In re Eleventh Avenue*, 81 N. Y. 436; Prescott v. Edwards, 117 Cal. 298. In such case, the individual purchasers of the lots at least would acquire private rights of way over the streets thus mapped out. 2 Tiffany, Real Prop., § 320.

(1512)

vacated. And in case *some of the lots* have been sold, the plat may be vacated in the same way by the *joinder of all the owners of lots* in the execution of such writing.⁷

§ 1355. Acceptance of the Dedication.

Until the dedication is *accepted* by the public, it is in the nature of a mere *offer* or *license* by the owner, which he may withdraw at any time;¹ and which will impose no responsibility for maintenance or repairs upon the public authorities;²—neither of which consequences result if there has been an acceptance.³

This acceptance by the state or municipal authorities may be informal or implied as well as formal and express, as when the authorities in charge of such matters, without express acceptance, make repairs and improvements⁴ (though it is otherwise in Virginia with regard to *county* roads, which must be formally

7. Va. Code, 1904, § 2510a. This statute applies only to city, town or suburban lots, and the dedication, it would seem, is only of city, town or suburban *streets and alleys* and not of *country highways*. No *acceptance* by the public is required by the statute, but since it is made equivalent to a “deed in fee simple,” it would seem *dissent* by the authorities would abrogate it. Ante, § 1195. See 7 Va. Law Reg. 476; 5 Va. Law Reg. 477. But *quære* if a technical *disclaimer* would not be necessary. See ante, § 1195.

1. Newport News, etc., Co. v. Lake, 101 Va. 338, 43 S. E. 566; Terry v. McClung, 104 Va. 599, 52 S. E. 355; Gaines v. Merryman, 95 Va. 660, 29 S. E. 738; Hayden v. Stone, 112 Mass. 346; Baldwin v. Bufalo, 35 N. Y. 375; Price v. Inhabitants, etc., 92 Mo. 378; Prescott v. Edwards, 117 Cal. 298; Clendenin v. Construction Co., 86 Md. 80.

2. Elliott, Roads & Streets, § 150; Richmond City v. Gallego Mills Co., 102 Va. 165, 45 S. E. 877; Booraem v. Railway Co., 39 N. J. Eq. 465; San Francisco v. Calderwood, 31 Cal. 585, 91 Am. Dec. 545; State v. Atherton, 16 N. H. 203.

3. Richmond City v. Gallego Mills Co., 102 Va. 165, 45 S. E. 877; Newport News v. Scott, 103 Va. 794, 50 S. E. 266; Terry v. McClung, 104 Va. 599, 52 S. E. 355; Com. v. Kelly, 8 Gratt. (Va.) 632, and note Va. Rep. Anno.; Harris v. Com., 20 Gratt. 833; Gaines v. Merryman, 95 Va. 660, 29 S. E. 738.

4. Richmond City v. Gallego Mills Co., 102 Va. 165, 45 S. E. 877; Wright v. Tukey, 3 Cush. (Mass.) 290; Dubois Cemetery Co. v. Griffin, 165 Penn. St. 81; Falsom v. Underhill, 36 Vt. 580.

(1513)

accepted by the county court, and the acceptance entered of record).⁵ Indeed, after an offer of dedication, acceptance may often be *presumed* by the jury from mere user by the public, though the authorities take no notice of the offer.⁶

If land be dedicated for particular public uses, and the dedication is accepted, the authorities are bound to use it for such purposes, and their user of the land for other purposes may be restrained in equity upon the application of owners of other land injured by such user,⁷ or by the dedicator himself, if he has retained the ultimate ownership of the land in his own hands.⁸ But such improper use by the authorities does not terminate the right of the public to use the land in the manner prescribed by the dedicator.⁹

In case the use for which the land is dedicated to, and accepted by, the public is *abandoned* or becomes impossible, the land reverts to the original dedicator or those claiming under him.¹⁰

5. *Terry v. McClung*, 104 Va. 603, 52 S. E. 355; *Com. v. Kelly*, 8 Gratt. (Va.) 632; *Gaines v. Merryman*, 95 Va. 660, 29 S. E. 738; *Lynchburg Traction Co. v. Guill*, 107 Va. 86, 57 S. E. 644.

6. *Richmond City v. Gallego Mills Co.*, 102 Va. 165, 45 S. E. 877; *Atto. Gen. v. Tarr*, 148 Mass. 309; *Flack v. Green Island*, 122 N. Y. 107; *State v. South Amboy*, 57 N. J. L. 252; *Hartford v. Railway Co.*, 59 Conn. 250; *Parsons v. Atlanta University*, 44 Ga. 529.

7. 2 *Tiffany*, Real Prop., § 424; *Huber v. Gazley*, 3 Ohio St. 399; *State v. Travis County*, 85 Tex. 435; *Price v. Thompson*, 48 Mo. 363; *Lutterloh v. Cedar Keys*, 15 Fla. 306.

8. *Hardy v. Memphis*, 10 Heisk. (Tenn.) 127; 2 *Tiffany*, Real Prop., § 424.

9. 2 *Tiffany*, Real Prop., § 424; *Barclay v. Howell*, 6 Pet. 498; *Hardy v. Memphis*, 10 Heisk. (Tenn.) 127.

10. 2 *Tiffany*, Real Prop., §§ 365, 424; *Glasgow v. Mathews*, 106 Va. 14, 54 S. E. 991; *Mahoning County v. Young*, 8 C. C. A. 27, 59 Fed. 96; *Benham v. Potter*, 52 Conn. 248; *Baltimore & O. R. Co. v. Gould*, 67 Md. 60; *Bayard v. Hargrove*, 45 Ga. 342; *Board of Education v. Inhabitants*, etc., 18 Ohio St. 221, 98 Am. Dec. 114; *Heard v. Brooklyn*, 60 N. Y. 242.

(1514)

CHAPTER XLIX.

TITLE UNDER DELINQUENT TAX SALES.

- § 1356. Outline of Discussion.
- 1357. The Several Theories of Tax Sales.
- 1358. Due Process of Law for Taxation of Land.
- 1359. Listing and Valuation of Land in Land Books, and Levy of Tax.
- 1360. Relief against Erroneous Assessments of Taxes.
- 1361. Primary Liability of Personalty.
- 1362. Treasurer's Return of Lists of Delinquent Lands—Delinquent Tax Book.
- 1363. Posting Delinquent List and Notice of Sale.
- 1364. Time and Place of Sale.
- 1365. Quantity of Land to Be Sold and in What Parcels.
- 1366. Effect of Sale for Illegal or Excessive Taxes.
- 1367. The Officer Who Is to Sell and Convey.
- 1368. Terms of the Tax Sale.
- 1369. The Purchaser at the Sale.
- 1370. Agents and Persons in Confidential Relations to the Owner, as Purchasers.
- 1371. Officers Conducting the Sale and Making the Tax Deed, as Purchasers.
- 1372. The State as Purchaser.
- 1373. Treasurer's Return of Sales—Delinquent Land Book.
- 1374. Resale by State Where Land Is Bought in by State at Original Tax Sale.
- 1375. Same—Effect of Irregularity in Application or Notice.
- 1376. Right of Redemption—Who May Redeem.
- 1377. To Whom Redemption Money Payable.
- 1378. Period Allowed for Redemption.
- 1379. Amount to Be Paid for Redemption.
- 1380. Retrospective Legislation Touching Redemption.
- 1381. Purchaser's Right to a Tax Deed.
- 1382. General Requisites of Tax Deed.
- 1383. Recitals to Be Contained in Tax Deed.
- 1384. Recordation of Tax Deed.
- 1385. Title Conferred upon Purchaser by Tax Deed.
- 1386. Curative Effect of Tax Deed.
- 1387. Constitutionality of the Virginia Curative Statute.

(1515)

§ 1356. Outline of Discussion.

This topic will be developed under the following heads: (1) The several theories of tax sales; (2) Due process of law for taxation of land; (3) Listing of land in the land books, the valuation thereof, and the levy of the tax; (4) Relief against erroneous assessments of taxes; (5) Primary liability of the personalty; (6) Treasurer's return of list of delinquent lands; (7) Posting delinquent list, and notice of sale; (8) Time and place of sale; (9) Quantity of land to be sold, and in what parcels; (10) Effect of sale for illegal or excessive taxes; (11) The officer who is to sell and convey the land; (12) Terms of sale; (13) The purchaser at the sale; (14) Treasurer's return of sales; (15) Resale by the state where the land is bought in by the state at the original tax sale; (16) Redemption; (17) Purchaser's right to tax deed; (18) General requisites of a tax deed; (19) Recitals to be contained in tax deed; (20) Recordation of the tax deed; (21) Title conferred upon purchaser by tax deed; (22) Curative effect of the tax deed; (23) Constitutionality of the Virginia curative statute.

§ 1357. The Several Theories of Tax Sales.

No government can be carried on without expense. The right to govern therefore necessarily implies a power to collect proportionately from the governed the amount needful to pay all reasonable expenses.

Of the *state's* power to tax to any extent, and in any manner, not prohibited by the constitution, there can be no question.¹

Counties and municipalities are instrumentalities established for the convenient administration of local self-government, and to them, subject to constitutional limitations, the legislature may delegate the power to tax to the extent needful for good government.²

1. *McCulloch v. Maryland*, 4 Wheat. 316; *Transportation Co. v. Wheeling*, 99 U. S. 273, 279; *Martin v. Snowden*, 18 Gratt. (Va.) 100; *Peters v. Lynchburg*, 76 Va. 927, 929.

2. *U. S. v. New Orleans*, 98 U. S. 381; *Bull v. Read*, 13 Gratt. (Va.) 78, 98.

The forfeiture or sale of land for taxes was unknown to the common law, and does not seem to have been recognized,—generally, at least,—by the statutes of the colonial period. Virginia was perhaps the first to adopt the plan, such a statute having been passed by her legislature in 1790.³

At first, the policy of Virginia was to *forfeit* the delinquent land absolutely to the commonwealth,⁴ upon the theory that the owner holds his land of the *state*, upon the *implied condition* that he will furnish a list of his taxable property when required by law and promptly pay his share of the taxes ratably assessed thereon; failing in which, the paramount authority of the state forfeits the land for the breach of the condition.⁵

But the principle, which gives the *state*, from whom the land is originally derived, the right to impose such an implied condition, denies it to the *federal* government on the one hand and to *county or city* governments on the other. For the owner of land within the borders of a state does not hold his land of the federal government nor of the municipal nor quasi municipal government under which he lives, but of the *state*. Hence, an *act of Congress*, laying a direct tax upon lands within a state, is invalid, so far as it provides for the absolute *forfeiture* of the land to the United States upon failure to pay the taxes assessed thereon.⁶ So, also, a forfeiture, or even a sale, of land delinquent for taxes due a *county or city*, without express legislative authority is invalid.⁷

But the policy of Virginia has long been altered. Her laws no longer declare delinquent lands *forfeited*, but merely provide that there shall be a *lien* for state taxes and for county or city levies assessed thereon; which lien, however, is to be paramount

3. *Martin v. Snowden*, 18 Gratt. (Va.) 100, 136, 138.

4. See 2 Rev. Code (Va.), 1819, p. 531; *Flanagan v. Grimmett*, 10 Gratt. (Va.) 421, 427; *Smith v. Chapman*, 10 Gratt. 445, 463.

5. *Martin v. Snowden*, 18 Gratt. (Va.) 100, 133.

6. *Martin v. Snowden*, 18 Gratt. (Va.) 100, 133; *Downey v. Nutt*, 19 Gratt. 59.

7. *Sharp v. Speir*, 4 Hill (N. Y.) 76; *Green v. Ward*, 82 Va. 324, 326.

to every other charge on the land, whether by mortgage, judgment, vendor's or mechanic's lien, or otherwise, though the latter be prior in point of time.⁸

But even upon the theory that the delinquent tax constitutes a *lien* upon the land, since the practice in Virginia is to sell at the tax sale merely for the amount of the tax, with interest, penalties, and costs, it amounts substantially to a forfeiture; and the authorities are practically unanimous in declaring that the statutory directions are to be strictly followed, and that every material step in the proceeding having the least semblance of benefit or protection to the unfortunate owner must be in strict accord with the provisions of the statute; otherwise the sale, in the absence of a statute curing defects or irregularities in the proceedings, will be invalid.⁹

In Virginia, there is such a curative statute, applicable however only after a proper *tax deed* has been made to the tax purchaser, the details of which will be considered fully hereafter.¹⁰

§ 1358. Due Process of Law for Taxation of Land.

The exercise of the power of taxation is a taking of a person's property by the state, and falls within the purview of the fourteenth amendment to the federal constitution providing that

8. Va. Code, 1904, §§ 456, 636, 636a; *Simmons v. Lyle*, 32 Gratt. (Va.) 752; *Thomas v. Jones*, 94 Va. 756, 27 S. E. 813. Nor is this result altered by the statute declaring that a tax deed shall vest in the grantee therein *such title as was vested* in the party assessed with the taxes or levies on account of which the sale was made, Va. Code, 1904, § 661, since this statute refers merely to the *quantity* of interest or estate, as in fee simple or for life, and does not mean that the tax purchaser takes the land *subject to liens* resting thereon at the time the taxes were assessed. *Thomas v. Jones*, 94 Va. 756, 27 S. E. 813.

9. *Chapman v. Bennett*, 2 Leigh (Va.) 329, 330; *Yancey v. Hopkins*, 1 Munf. (Va.) 419, 428, 436; *Christy v. Minor*, 4 Munf. 431, 435; *Nalle v. Fenwick*, 4 Rand. (Va.) 585; *Jesse v. Preston*, 5 Gratt. (Va.) 120; *Flanagan v. Grimmer*, 10 Gratt. 421; *Boon v. Simmons*, 88 Va. 259, 13 S. E. 439; *Bond v. Pettit*, 89 Va. 474, 16 S. E. 666; *Thomas v. Jones*, 98 Va. 323, 36 S. E. 382.

10. Va. Code, 1904, § 661; post, § 1386.
(1518)

"no state shall deprive any person of life, liberty or *property* without *due process of law*."

The gist of "due process of law" consists in *the opportunity* afforded for the person threatened *to be heard in his own behalf*, the nature of the opportunity differing with the proceedings under which the party is threatened. It may be one thing for *judicial* proceedings in *criminal* cases, another for *civil actions*, yet another for *condemnation* proceedings under eminent domain, and still another in the exercise of the *taxing* power.¹

With respect to *taxation*, it is settled that "due process of law" demands (1) That the property to be taxed be properly and accurately *listed* for taxation in books, kept for the purpose and open to the public, in such a manner as to inform persons interested of the property to be taxed, its owner, and the amount of the tax; (2) That the property be *valued* by an impartial tribunal, an opportunity having been afforded the owner to contest the valuation, which valuation shall also be matter of public record; (3) That upon such valuation the tax shall be *levied* or estimated in the proportion designated by the tax law.

These are the fundamental and jurisdictional steps in "due process of law," as applied to taxation, and no state law can dispense with any of them without violating the federal constitution, though the *manner of performing them* is in the discretion of the legislature.²

Furthermore, supposing these steps complied with, and the land delinquent because of the nonpayment of the tax due, another and a distinct case arises for the operation of "due process of law" when the delinquent land is put up for *sale* at the tax sale,—at least, in those states whose policy calls for a *lien* upon land for unpaid taxes, rather than for a *forfeiture* of the land itself. Here too, due process of law demands that the owner shall be given the opportunity to protect himself against

1. Cooley, Constitutional Law (3d ed.), 241, et seq., 244.

2. Minor, Tax-Titles, 131, et seq.; Heth v. Radford, 96 Va. 272, 31 S. E. 8. See Douglas Co. v. Com., 97 Va. 401, 34 S. E. 52; Douglas v. Stone, 110 Fed. 812.

an unjust or illegal *taking* of his property, and to that end demands (1) that he shall *continue to be liable* for the tax at the time of the sale; (2) that he shall have *notice* of the tax sale; (3) that there shall be an *actual sale*; (4) at the *time and place* duly appointed; (5) that the sale be *public*; and (6) that it be *bona fide* and *without fraud*.³

§ 1359. Listing and Valuation of the Land in the Land-Books, and Levy of the Tax.

The mode of listing and valuing land is a matter of statutory regulation in each state. In Virginia, these duties fall mainly upon officers, called "*assessors*," appointed by the courts of each county and corporation once in five years, who shall list and value all the lands in their respective counties or corporations in books for the purpose, which is done every fifth year (in 1900, 1905, 1910, etc.).¹ But such changes as must be made annually by reason of transfers of ownership or enhancement or deterioration of values, due to the erection or destruction of improvements upon the land, are made by the "*commissioners of the revenue*," of the respective counties or corporations, when they annually make up the "land-books."²

Upon the lands thus listed and valued in the land-books, which he makes out annually, the commissioner of the revenue *levies*, that is, computes accurately and sets forth in the land-books, the amount of the tax at the legal rate.³

3. Minor, Tax-Titles, 141, et seq.

1. Va. Code, 1904, §§ 437, et seq., 472; Acts, 1906, p. 554, et seq.; Minor, Tax-Titles, 8, 9.

2. Va. Code, 1904, §§ 452, et seq., 467, et seq., 480, et seq.; Minor, Tax-Titles, 11, et seq.

3. Va. Code, 1904, § 466. As to the precise items to be set forth in the land-books for the information of landowners and as part of the accurate description of the land, see Va. Code, 1904, § 464, et seq. For the sources of information to which the assessors and commissioners are to resort in making out the land-books, see Va. Code, 1904, §§ 439, 452, et seq., 458, et seq., 469, et seq., 474; Acts, 1906, p. 557; Minor, Tax-Titles, 8, 11, et seq. See, also, Va. Code, 1904, §§ 634, 635, whereby it is made the *owner's* duty, under penalty of *for-* (1520)

Perhaps the most difficult question presented by the constitutional requirement that the land be accurately listed in the name of the owner and according to a proper description arises in regard to what divergencies from the true name or how vague a description will violate the constitutional requirement.

The general rule seems to be that if the name in which the property is listed is the true name of the *freehold* owner, or so nearly like it, as to make it impossible that one should mistake for whom the name is intended, the listing is valid.⁴

A Virginia statute provides that if the owner be *dead* the land may be listed in the name of *his heirs or devisees*.⁵ This statute seems to contemplate that the heirs or devisees shall appear upon the land-books *by name*, but independently of statute the general rule is that the land of a deceased owner may be listed in the name of "the heirs of Z" or "the devisees of Z," without designating them by name.⁶ It should not continue to be listed, after a great length of time, in the name of the deceased owner himself.⁷ Nor should it continue to be listed for an unreasonable period in the name of an owner who has *assigned* his interest in the land to another, especially where such assignment is not recorded, since it would tend to mislead tax purchasers of the land, if not the true owner.⁸ But by a Virginia statute it is enacted that a purchaser under a tax deed shall acquire the estate that was vested in the party in whose name the land was listed

feiture of the land to the state to see that his land is duly entered on the land-books. Land *exempt* from taxation is to be omitted from the land-books. Va. Code, 1904, § 456. As to what lands are exempt, see Va. Code, 1904, § 457; Va. Const., § 183; *Com. v. Hampton Institute*, 106 Va. 614, 56 S. E. 594.

4. *Stevenson v. Henkle*, 100 Va. 591, 595, 42 S. E. 672; *Glenn v. West*, 106 Va. 356, 56 S. E. 143; *Westhampton v. Searle*, 127 Mass. 502; *State v. Mathews*, 40 N. J. L. 269; *O'Neal v. Bridge Co.*, 18 Md. 1; *Thorndike v. Camden*, 82 Me. 39.

5. Va. Code, 1904, § 474.

6. *Burroughs, Taxation*, 204; *Cucullu v. Lumber Co.*, 49 La. An. 1445, 22 So. 409.

7. *Cucullu v. Lumber Co.*, 49 La. An. 1445, 22 So. 409.

8. See *Gates v. Lawson*, 32 Gratt. (Va.) 12.

at the commencement of the year for which the delinquent taxes were assessed *or in any person claiming under such party*.⁹ Under this statute therefore, if it be *constitutional*, the land may remain listed indefinitely in the name of a prior owner who has assigned all his interest therein.

§ 1360. Relief against Erroneous Assessments of Taxes.

The person aggrieved may, within two years from the first of September of the year of assessment, apply for relief to the court in which the commissioner of the revenue gave bond, etc., making the attorney for the commonwealth a defendant.¹

If the court is satisfied that the applicant is erroneously charged and that he is not himself in default, it may order that the assessment be corrected, the applicant excused from the payment of so much as is erroneously charged, if not already paid, and if paid that it be refunded to him. But if the valuation prove to be *too small*, the court shall correct it and order that the applicant pay the proper taxes.²

§ 1361. Primary Liability of the Personality.

In many states, for the protection of the owner, his *personality* is expressly made primarily liable for the taxes upon his land, recourse to the *realty* being permitted only upon failure of the officer after diligent search to discover personality sufficient to satisfy the demand.¹ In such states, in the absence of a statute curing the defect, it is generally held to be fatal to the tax title to sell the land before it has been made clearly manifest that the personality is not sufficient.²

9. Va. Code, 1904, § 661.

1. Va. Code, 1904, § 567.

2. Va. Code, 1904, § 568.

1. Minor, Tax-Titles, 32, 33; Jackson v. Shepard, 7 Cow. (N. Y.) 88, 17 Am. Dec. 502; Scales v. Alvis, 12 Ala. 617, 46 Am. Dec. 269; Wheeler v. Bramel, 10 Ky. Law R. 301, 8 S. W. 199; Helms v. Wagner, 102 Ind. 385.

2. Minor, Tax-Titles, 33; Doe v. Minge, 56 Ala. 121; Pitcher v. Dove, 99 Ind. 175.

(1522)

Whether this principle is applicable in Virginia is somewhat doubtful, though provision is made for the collection of taxes, in the first instance, out of the *personalty* by *distress* or *action*.³ But in Virginia prior recourse against the personalty does not seem to be *essential* to the validity of a tax sale of land, the only *designated* effect of a failure to take this preliminary step being that the treasurer is subjected to a *fine*.⁴

§ 1362. Treasurer's Return of Lists of Delinquent Lands—Delinquent Tax Book.

It is the duty of the *county or city treasurer* to collect the taxes.¹ The Virginia statutes enact that the treasurer is to make out lists of the delinquent land in his county or corporation, verified by his affidavit, which he is to return to the court for examination, and the court, being satisfied of their correctness or correcting them if erroneous, shall, after the ratification of the lists by the commissioner of the revenue and the county board of supervisors, or the city council, direct the clerk to certify copies thereof to the auditor of public accounts in Richmond, and to record the lists in the clerk's office in a book known as the "*Delinquent Tax Book*."²

§ 1363. Posting Delinquent List and Notice of Sale.

The clerk is to make a copy of the delinquent list, purged and corrected as shown in the preceding section, and shall deliver it to the county or city treasurer, who posts a *printed* copy thereof in conspicuous places, or the auditor of public accounts may di-

3. Va. Code, 1904, § 603.

4. Va. Code, 1904, § 609. But see *Pugh v. Russell*, 27 Gratt. (Va.) 789, 800, where it is held that the lien upon land for taxes can never be enforced so long as there is personalty. "The latter *must be exhausted* before the land is delinquent or liable." For this view the court cites no authority. It may be noted that this decision was rendered before the enactment of Va. Code, 1904, § 609.

1. Va. Code, 1904, § 603.

2. Va. Code, 1904, §§ 608, 611, 612. This list need not be in alphabetical order. *Harrison v. Thomas*, 103 Va. 333, 49 S. E. 485.

rect a copy to be inserted once in a paper published in the county or city.¹ To each copy thus printed or published the treasurer shall attach a *notice* that the land, or *so much as shall be necessary* to satisfy the taxes, interest and charges due thereon, will be sold *at public auction* on the first Monday of January next succeeding, between the hours of ten in the morning and four in the afternoon, in front of the courthouse, unless the taxes due shall be previously paid.²

It will be observed that this notice, unlike the other proceedings preliminary to the tax sale, does not appear in the *records* of the clerk's office, save only by way of *recital* in the treasurer's report of sales, which is required to be there recorded, after confirmation of the same by the court.³

It is well settled that, in the absence of a statute curing defects and irregularities of the sort, any material error or omission in the publication of the delinquent list, or in the notice of sale will render the sale invalid.⁴ Thus, where the statute provided that public notice of the time and place of sale should be given by advertisement inserted in some newspaper *once* in each week for *twelve* successive weeks, it was held that if the property was sold after being advertised for only *eighty-two days*, the sale was illegal, though advertised thirteen times.⁵

So, any material inaccuracy or insufficiency of description of the delinquent land, contained in the list, will usually avoid the sale. The description in the delinquent list should follow closely that in the land-books.⁶ The purposes in describing and advertising lands to be sold at a tax sale are threefold; (1) To

1. Va. Code, 1904, § 637.

2. Va. Code, 1904, § 637.

3. Va. Code, 1904, §§ 642, 645; *Flanagan v. Grimmitt*, 10 Gratt. (Va.) 421, 438.

4. *Williams v. Peyton*, 4 Wheat. 77; *Ronkendorff v. Taylor*, 4 Pet. 349; *Nalle v. Fenwick*, 4 Rand. (Va.) 585; *Allen v. Smith*, 1 Leigh (Va.) 231.

5. *Early v. Doe*, 16 How. 610.

6. *Ronkendorff v. Taylor*, 4 Pet. 349; *Keely v. Sanders*, 99 U. S. 441; *Knight v. Alexander*, 38 Minn. 384, 8 Am. St. Rep. 675; *Boon v. Simmons*, 88 Va. 259, 13 S. E. 439.

inform the owner and give him an opportunity to protect himself by paying the taxes or bidding in the property at the sale; (2) To inform the *public*, and thus by a lively competition reduce the owner's loss to a *minimum*, at the same time by wider publication making it more certain that the owner will become aware of the peril to his property; and (3) To inform the *tax purchaser*, so that he may know definitely what land he is purchasing.⁷ If the description of the land is sufficient to *inform the owner*, that is all the law requires, but in order that it may suffice for this purpose, it is usually necessary that the description be such as to enable a stranger to ascertain its location without undue inquiry.⁸

So, also, a failure to give the name of the owner, or his residence, in the advertisement, when these things are required by the statute, or an incorrect statement of the owner's name, are in general such errors as, in the absence of a curative statute, will invalidate the sale.⁹ And when the law expressly requires *printed* notices to be posted, as is the case in Virginia,¹⁰ a sale under a *written* notice is void, in the absence of a curative statute; for some persons may be able to read print who cannot read writing, and at all events printed notices attract more attention.¹¹

A fortiori, if there is no advertisement or notice of sale at all, regular or irregular, the sale is void.¹²

§ 1364. Time and Place of Sale.

The owner must be notified of the time and place of sale, in order that he may have the opportunity to be present. The courts

7. Keely v. Sanders, 99 U. S. 441, 443.

8. Keely v. Sanders, 99 U. S. 441, 443; Ronkendorff v. Taylor, 4 Pet. 349, 363.

9. Farnum v. Buffum, 4 Cush. (Mass.) 260; Styles v. Weir, 26 Miss. 187; Lyons v. Hunt, 11 Ala. 295, 46 Am. Dec. 216, 224; Milne v. Clarke, 61 Ala. 258.

10. Va. Code, 1904, § 637.

11. Va. Code, 1904, § 661; Lagrove v. Rains, 48 Mo. 536.

12. Bush v. Davison, 16 Wend. (N. Y.) 550; Lyon v. Hunt, 11 Ala. 295, 46 Am. Dec. 216, 224; Va. Code, 1904, § 661.

are particularly strict in requiring the officers to conform to these requirements because of their importance to the owner. Thus, when the statute required, as the Virginia statute substantially does,¹ that the sale should be made *before* the courthouse, a sale made *within* the courthouse or in the treasurer's office was avoided.²

In Virginia, the statute names the time and place of the sale. It is to take place on the first Monday of the January next succeeding, between the hours of ten *a. m.* and four *p. m.*, and the place is the front door of the courthouse.³

It is also provided that the sale may be *adjourned from day to day* until completed. And if the sale be not completed on the last day of the court, it shall be adjourned to the first day of the next court. But notice of such adjournment shall be given by *proclamation to the bystanders*, and by posting a notice thereof at the front door of the courthouse.⁴

§ 1365. Quantity of Land to Be Sold, and in What Parcels.

In general no land should be sold at a tax sale except that which is actually delinquent. Hence, where taxes were assessed against a *whole tract*, and subsequently an *undivided one-third interest* therein was listed separately, the taxes on which had been paid, it was held that the sale of the *whole tract* for the taxes delinquent was void.¹

Independently of statute, the general rule is that the sale must follow the assessment list.² Hence, a sale of several parcels of

1. Va. Code, 1904, § 637.

2. Rubey *v.* Huntsman, 32 Mo. 501, 82 Am. Dec. 143; Sommers *v.* Ward, 41 W. Va. 76, 23 S. E. 520.

3. Va. Code, 1904, § 637.

4. Va. Code, 1904, § 638. See *Va. Coal Co. v. Thomas*, 97 Va. 536, 34 S. E. 486, 5 Va. Law Reg. 556.

1. Jones *v.* Gibson, N. C. Term Rep. 41, 7 Am. Dec. 690; Minor, Tax-Titles, 55.

2. Minor, Tax-Titles, 56; Ballance *v.* Forsyth, 13 How. 18, 24; Hayden *v.* Foster, 13 Pick. (Mass.) 492, 499; Jordan *v.* Hyatt, 3 Barb. (N. Y.) 275; State *v.* Sargent, 76 Mo. 557.

land *en masse* for a gross sum is irregular, and cannot be upheld, and a tax deed showing this course to have been pursued is invalid on its face.³

Thus, where three tracts are mentioned in the assessment list by their respective names, and the quantity in each is given, even though that quantity be also aggregated and valued at a certain amount per acre, this is a separate assessment of each tract, and each should be *sold separately* for the taxes due thereon.⁴ But if several parcels of land adjoin and lie in compact form, and are used and occupied as a single tract, and assessed as such, they may be sold for a single consideration.⁵

In Virginia, it is expressly provided by statute that the sale of country lands shall be of *each tract separately*, or of *such quantity or part* thereof as shall suffice to satisfy the taxes and levies thereon, with interest and charges; and that the sale of *city and town lots* shall be of each lot separately, or of *such undivided interest therein* as shall suffice for the same purpose.⁶

While this statute requires each tract or lot to be sold *separately*, thus prohibiting the sale of several lots *en masse*, the sale, it would seem, must still follow the assessment list, and if several adjacent tracts are used and occupied together, and are so assessed, they may be considered as *one tract* for purposes of sale.⁷

§ 1366. Effect of Sale for Illegal or Excessive Taxes.

It is a general presumption of law that when land has been sold for taxes in part *illegal*, some portion of the land has been

3. Barnes v. Boardman, 149 Mass. 106; Nason v. Ricker, 63 Me. 381; Woodburn v. Wireman, 27 Penn. St. 18; Cook v. Simmons, 55 Ark. 104; Tucker v. Whittlesy, 74 Wis. 74.

4. Woodburn v. Wireman, 27 Penn. St. 18.

5. Springer v. U. S., 102 U. S. 586; Woodburn v. Wireman, 27 Penn. St. 18; Brien v. O'Shaughnesy, 3 Lea (Tenn.) 724; Green v. Wheeler, 41 Ia. 85. See Slater v. Maxwell, 6 Wall. 268.

6. Va. Code, 1904, § 639.

7. Minor, Tax-Titles, 57; Springer v. U. S., 102 U. S. 586; Woodburn v. Wireman, 27 Penn. St. 18; Green v. Wheeler, 41 Ia. 85.

taken to satisfy an illegal demand, and that the necessity might not have arisen for the sale, if only the legal and true tax had been called for. The illegality of part of the taxes for which the land is sold, however small that part may be, taints the whole transaction and renders the sale void.¹

And so it is also in case of an *excessive* tax, for a tax in excess of the legal amount is an *illegal tax*. According to the better view, it is immaterial how small the excess may be. For although it has been contended that when the excess is very trifling the sale should be upheld upon the maxim "*de minimis lex non curat*,"² yet since tax sales are in the nature of forfeitures and to be construed strictly, and since a sum which would appear trifling to one may mean much to another in different circumstances, the safer and better rule is that the sale is void for *any excess whatever*. The same stern justice that demands the pound of flesh forbids the shedding of one drop of blood.³

§ 1367. The Officer Who Is to Sell and Convey.

In Virginia, the *county or city treasurer* makes the tax sale.¹ But the power to sell ceases with his official term, and a sale made by him after his term has expired is merely void.²

In general, in the absence of statutory direction to the con-

1. Minor, Tax-Titles, 58; Libby v. Burnham, 15 Mass. 144; Stetson v. Kempton, 13 Mass. 272; Drew v. Drew, 10 Vt. 506, 33 Am. Dec. 213; Barker v. Blake, 36 Me. 433; Lacey v. Davis, 4 Mich. 140, 66 Am. Dec. 524; Silsby v. Stockle, 44 Mich. 569; Peterson v. Kittredge, 65 Miss. 33. This case is to be carefully distinguished from that of a *personal action* brought against the tax collector for an illegal tax collected. In the latter case, if the illegal part can be separated, that alone will be rejected. Lacey v. Davis, *supra*. But see Libby v. Burnham, *supra*.

2. Colman v. Shattuck, 62 N. Y. 348, 363.

3. Wells v. Burbank, 17 N. H. 393; Boyden v. Moore, 5 Mass. 365; Libby v. Burnham, 15 Mass. 144; Glidden v. Chase, 35 Me. 90; Burroughs v. Goff, 64 Mich. 464; Kimball v. Ballard, 19 Wis. 601, 88 Am. Dec. 705; Doland v. Mooney, 79 Cal. 137.

1. Va. Code, 1904, §§ 637, 638.

2. McCullough v. Hunter, 90 Va. 699, 19 S. E. 776.
(1528)

trary, the officer who makes the sale is also to execute the tax deed, and if made by any other official than the one authorized the deed is invalid and of no effect.³ But in Virginia, the two duties are now separated, and that of executing the tax deed is devolved upon the *clerk* of the court of the county or corporation where the land lies, unless he is himself the purchaser, in which case a special commissioner is appointed to execute it.⁴

§ 1368. Terms of the Tax Sale.

In the absence of statute expressly providing for credit to be given, the sale is to be *for cash* to the highest bidder.¹ The state of course may expressly undertake to watch over the interests of the landowner as well as its own, and to sell the whole tract for its *market value* and to preserve for the benefit of the owner the surplus over and above the amount of the delinquent taxes, charges, etc. But this is not the usual practice. If the law makes no provision for the exercise of such guardian care of the owner's interests, but yet provides that the sale is to be made to the "highest bidder," this is generally construed to mean the bidder who will pay the taxes, costs and charges for the *least quantity of land*, leaving the balance of the delinquent tract to the owner.² And such is the interpretation to be given to the Virginia statute.³

§ 1369. The Purchaser at the Sale.

In general, any person who may purchase land in a private transaction may purchase at a tax sale. But there are certain well defined cases in which a tax sale will be rendered *invalid* by reason of the character of the purchaser, or at least the pur-

3. Minor, Tax-Titles, 60; Rockbold v. Barnes, 3 Rand. (Va.) 474; Chapman v. Bennett, 2 Leigh (Va.) 229; Wilson v. Doe, 7 Leigh 22; Flanagan v. Grimmitt, 10 Gratt. (Va.) 421, 435; Hobbs v. Shumate, 11 Gratt. 518.

4. Va. Code, 1904, §§ 655, 656.

1. Minor, Tax-Titles, 62; Cushing v. Longfellow, 26 Me. 306; Donnel v. Bellas, 34 Penn. St. 157.

2. Minor, Tax-Titles, 62; Lovejoy v. Lunt, 48 Me. 378.

3. Va. Code, 1904, §§ 637, 638; Minor, Tax-Titles, 62, et seq. See Kinney v. Beverley, 2 Hen. & M. (Va.) 318, 329.

chaser will be considered in equity as holding the legal title only as a *constructive trustee*.¹

One, whose duty it is to pay the taxes on a tract of land not belonging entirely to him, cannot, by neglecting to pay them and thus causing the land to be sold to the detriment of others interested, add to or strengthen his own title. He will not be permitted thus to take advantage of his own wrong, and in such cheap and fraudulent fashion rid himself of incumbrances and claims upon the land which would otherwise take precedence over his own. A purchase under such circumstances operates merely as a *payment of the taxes*, leaving the title in precisely the same situation as if the taxes had been paid when due.²

These principles apply in case of a tenant in common, a tenant for life, a tenant for years under covenant to pay taxes, a mortgagee, or a mortgagor in possession, etc.³

But one who holds a defective title may perfect it by purchasing the land at a tax sale, provided he stands in no relation of trust to the owner, and is implicated in no fraud against him.⁴

Whether this would be true in Virginia, under the statutory provision that the purchaser is to take at the tax sale the title which is vested in the party who is *assessed with the taxes* for which the sale is made, that is, the party legally bound to pay the taxes (according to the supposition made above, the tax purchaser himself), may perhaps be doubted.⁵

§ 1370. Same—Agents and Persons in Confidential Relations to the Owner, as Purchasers.

Upon the general principle that the dealings of an agent, or

1. Minor, Tax-Titles, 64.

2. Minor, Tax-Titles, 64; Mills v. Tukey, 22 Cal. 373, 83 Am. Dec. 74. See Blake v. Howe, 1 Aiken (Vt.) 306, 15 Am. Dec. 681, and note.

3. Minor, Tax-Titles, 64, et seq.; Pike v. Wassell, 94 U. S. 711, 714; Blake v. Howe, 1 Aiken (Vt.) 306, 15 Am. Dec. 681, note; Mills v. Tukey, 22 Cal. 373, 83 Am. Dec. 74; Estabrook v. Royon, 52 Ohio St. 318, 32 L. R. A. 805, note.

4. Minor, Tax-Titles, 65; Cox v. Gibson, 27 Penn. St. 160, 67 Am. Dec. 454; Moss v. Shear, 25 Cal. 38, 85 Am. Dec. 94; Link v. Doerfer, 42 Wis. 391, 24 Am. Rep. 417. See Langley v. Chapin, 134 Mass. 82.

5. Va. Code, 1904, § 661.

other person in confidential relations, with the subject of the agency or trust for his own benefit make him a *constructive trustee* for the other party, it is well settled that an agent, attorney, trustee, guardian, or other fiduciary having the control and management of real estate, or a joint tenant or tenant in common, is disqualified from purchasing the same at a tax sale on his own account, without having previously renounced the agency or trust, even though the principal or beneficiary fail to supply him with funds to meet the taxes.¹

§ 1371. Same—Officers Conducting the Sale, and Making the Tax Deed, as Purchasers.

It is well established, even without express legislation, on general principles of prudence and for the prevention of fraud, that the officer who makes the tax sale cannot purchase the land for his own benefit.¹ But the Virginia statute leaves nothing to doubt in this regard, it being expressly provided that the treasurer who makes the sale shall not directly nor indirectly purchase thereat, the sale in such event being declared void.²

There is not the same, nor indeed any, objection to the purchase by the officer whose duty it is to execute the *tax deed*, except where the same officer, performs both duties, as he does in the absence of statutory regulation.³ In Virginia, the clerk of the court is to execute the deed to the tax purchaser, but he has no connection with the sale itself.⁴ He is therefore permitted

1. Minor, Tax-Titles, 66, 67; Franks v. Morris, 9 W. Va. 664; Battin v. Woods, 27 W. Va. 58; Bartholomew v. Leech, 7 Watts (Penn.) 472; Oldham v. Jones, 5 B. Mon. (Ky.) 458, 467; Morris v. Joseph, 1 W. Va. 256, 91 Am. Dec. 386; Blake v. Howe, 1 Aiken (Vt.) 306, 15 Am. Dec. 681, 684, 690, note; Laton v. Balcom, 64 N. H. 92; Wright v. Walker, 30 Ark. 44; Willard v. Ames, 130 Ind. 351.

1. Minor, Tax-Titles, 67; Clute v. Barron, 2 Mich. 192; McLeod v. Burkhalter, 57 Miss. 65; Sponable v. Woodhouse, 48 Kan. 173; Chandler v. Moulton, 33 Vt. 245. See Yancey v. Hopkins, 1 Munf. (Va.) 419.

2. Va. Code, 1904, § 640.

3. Minor, Tax-Titles, 67, 68.

4. Va. Code, 1904, § 655.

§ 1373 TAX TITLES—TREASURER'S RETURN OF SALES. [Ch. 49

to purchase at the sale; but if he does so, since it would be incongruous for him to execute a tax deed to himself, it is provided that the deed is to be executed by a special commissioner appointed by the court for that purpose.⁵

§ 1372. **Same—The State as Purchaser.**

A *city or county*, in the absence of an enabling statute, cannot purchase lands sold at a tax sale. The mere general power to purchase and hold real estate does not suffice.¹

In Virginia, if there are no sufficient bids, authority is given the treasurer making the sale to buy in the land in the name of the auditor of public accounts for the benefit of the state, and county or city, respectively.² Provision is also made for the redemption of such land within two years or, if unredeemed, for the resale thereof by the state, all of which will be considered more at large hereafter.³

§ 1373. **Treasurer's Return of Sales—Delinquent Land-Book.**

In Virginia, if the purchasers are *private persons*, it is provided that within sixty days after the completion of the sale the treasurer shall report to the court the names of the persons charged with the delinquent taxes, the quantity and description of the land charged, the amount of taxes due, the quantity of land sold, the names of the purchasers, the amount of the purchase money, and the date of the sale, *reciting* also in his report that notice of the sale was advertised as required by law.¹ This

5. Va. Code, 1904, § 656.

1. Minor, Tax-Titles, 68; Logansport v. Humphrey, 84 Ind. 467; Miller v. Greggs, 26 Ia. 75; Champaign v. Harmon, 98 Ill. 491; Knox v. Peterson, 21 Wis. 247.

2. Va. Code, 1904, § 662. In such case, the state acquires the title vested in the person in whose name the tax for which the land is sold was assessed. Tabb v. Com., 98 Va. 47, 51 L. R. A. 283, 34 S. E. 946.

3. Va. Code, 1904, §§ 664, 666; post, §§ 1374, 1376, et seq.

1. Va. Code, 1904, § 642, et seq.; Minor, Tax-Titles, 71.
(1532)

report is to be signed by the treasurer and verified by his oath, the form of which is given, containing an allegation that he is "not directly nor indirectly interested in the purchase of any of the said real estate."²

The officer's failure to follow the directions of the statute in any of these particulars, since they are in part for the benefit of the owner, is fatal to the tax title, in the absence of a curative statute.³

The court, if it finds the report correct, or correcting it if erroneous, shall confirm the same and order it to be recorded and properly indexed in a book kept for the purpose, to be known as the "*Delinquent Land-Book*."⁴

A like list of all lands purchased by the *state* is to be returned, confirmed and recorded in the "*Delinquent Land-Book*."⁵

The Virginia statute further provides that any person aggrieved by the court's action in confirming the sale may apply for relief to the circuit court of the county or the corporation court of the city at any time *previous to the execution of the tax deed*; and upon proof that the taxes are not justly due from any cause or that the land is not liable therefor, such court may set aside and annul the sale and exonerate the land from the said taxes, and order the *restitution of the purchase money* to the purchaser. The treasurer, purchaser and commonwealth's attorney shall have at least five days notice of the application, and the latter shall be present and defend the same.⁶

2. Va. Code, 1904, §§ 642, 644; *Jackson v. Kittle*, 34 W. Va. 207, 12 S. E. 484; *Hays v. Heatherly*, 36 W. Va. 613, 15 S. E. 223.

3. *Minor*, Tax-Titles, 69, et seq.; *Bond v. Pettit*, 89 Va. 474, 487, 16 S. E. 666; *Braxton v. Reid*, 47 Fed. 178; *De Forest v. Thompson*, 40 Fed. 375; *Cook v. Laster*, 73 Fed. 701, 19 C. C. A. 654; *Jones v. Dils*, 18 W. Va. 759; *Jackson v. Kittle*, 34 W. Va. 207, 12 S. E. 484; *Hays v. Heatherly*, 36 W. Va. 613, 15 S. E. 223; *Doe v. Allen*, 67 N. C. 346; *Zingerling v. Henderson* (Miss.), 18 So. 432.

4. Va. Code, 1904, § 645.

5. Va. Code, 1904, § 662.

6. Va. Code, 1904, § 649.

§ 1374. Resale by State When Land Is Bought in by State at Original Tax Sale.

When, by reason of lack of bids, the state is compelled to buy in the land at a tax sale, it is to *hold it for the two years* during which the owner is given the right to redeem,¹ after which, if unredeemed meanwhile, it is open to purchase from the state by private parties, upon following the proceeding outlined by the statute.²

In brief, this proceeding is by application, filed with the circuit court of the county or the corporation court of the city wherein the land lies, for the purchase thereof for the amount of taxes for which the original tax sale was made, together with such *additional sums* as would have accrued from taxes had the land not been purchased by the state, with interest.

The application is to be accompanied by a *deposit* of at least ten per cent. of the purchase price and must set out the names of the owner and of the person in whose name it is listed, or their heirs and personal representatives, or of any trustees, mortgagees or beneficiaries disclosed by any records not more than twenty years old appearing in the clerk's office.

Copies of the application must be served on the parties named therein in the same manner as a process in a suit or, if the parties are nonresidents or cannot be found after diligent search, an order of publication may issue, a form of which is given in the statute.

If no person who has a right to redeem the land appears *within four months* and redeems the same by paying to the clerk all accrued taxes, penalties, interest and costs, as well as the fees and costs attending the application, including a *penalty payable to the applicant* of ten per cent. of the proposed purchase price, in no case to be less than two nor more than five dollars, then the applicant, *within five days* from the expiration of the four months above mentioned, may complete the purchase by paying to the clerk the balance of the purchase money.

1. Post, § 1378.

2. See Va. Code, 1904, § 666.

If the applicant does *not exercise his right within the five days*, he forfeits not only his right to the land, but to the amounts deposited by him with the clerk, and the land is again thrown open to purchase.

After his payment to the clerk the purchaser, in order to complete his purchase, must have a *report* made to the court by the county surveyor or city engineer, or some other competent surveyor appointed by the court, specifying the metes and bounds of the land, the owners of adjoining lands, and giving such further description as will identify the land, which report is to be recorded. The surveyor's report, however, may be dispensed with in the court's discretion.

The purchaser then obtains his *tax deed*, and may compel the clerk to execute it upon *petition* to the court. If the *deed* be not made *within one year* from the application (unless hindered by judicial proceedings) the right of redemption revives to the owner or others entitled to redeem, and continues until the deed is made.³

§ 1375. Same—Effect of Irregularity in Application or Notice.

The application must, substantially at least, comply with the requirements of the statute, making all interested persons designated by the statute parties, and giving them the notice thereof required by the law. Otherwise, a bill in equity may lie to enjoin the clerk from receiving the purchase money or making a deed.¹ The application and subsequent proceedings are invalid and of no effect as to mortgagees, deed of trust creditors or others, whose names appear of record and who are not duly notified.²

3. For the contents of this section, see Va. Code, 1904, § 666. See *Harrison v. Thomas*, 103 Va. 333, 49 S. E. 485.

1. *Baker v. Briggs*, 99 Va. 360, 38 S. E. 277; *Lewis v. Coons*, 96 Va. 506, 31 S. E. 904. See *Dooley v. Christian*, 96 Va. 534, 32 S. E. 54.

2. *Virginia B. & L. Co. v. Glenn*, 99 Va. 460, 39 S. E. 136. In this case A and his wife, B, united in a deed of trust conveying land belonging to B, but the deed was *indexed* in the deed books in the *name of A*. It was *assessed in the name of B*, and was sold for delin-
(1535)

§ 1376. Right of Redemption—Who May Redeem.

The Virginia statutes provide that the owner of the land, his heirs or assigns, or any person having the right to charge the land with a debt, may redeem the same.¹

The person offering to redeem the land must have some title thereto or connection therewith. One holding the land in a fiduciary capacity, or as agent, or one having an interest in the land as a tenant, a lien creditor, or the holder of an equitable title thereto, may in general redeem.² But a mere *stranger*, not interested in the land nor connected with it, cannot redeem,³ unless his payment of the redemption money is *accepted* by the purchaser, in which case such acceptance warrants a *prima facie* inference that the payment was made for some one having the right to redeem.⁴

A redemption does not create a new title, but merely cuts off the rights of the purchaser, and hence a lawful redemption by one cotenant operates in favor of all. A cotenant cannot pay *his share* of the taxes and thereby redeem *his proportion* of the land. If he redeems any, he must redeem all, in the absence of statute, and the whole land thus redeemed is held, as before, by

quent taxes, bought in by the state, and in due time G applied to purchase it. The application did not set forth the names of the trustee and beneficiary in the deed of trust. G obtained a tax deed in due course, and the beneficiary in the trust deed then instituted proceedings to annul it. The court held that the failure of the clerk to index the deed properly did not abrogate the beneficiary's right to notice of the application, since their names appeared of record, and that the tax deed was therefore void as to them.

1. Va. Code, 1904, § 650.

2. Minor, Tax-Titles, 97; Corbett v. Nutt, 18 Gratt. (Va.) 624, 10 Wall. 464; Rogers v. Rutter, 11 Gray (Mass.) 410; Bowers v. Williams, 34 Miss. 324; McKee v. Spice, 107 Mo. 452; Plumb v. Robinson, 13 Ohio St. 304.

3. Wood v. Welpton, 29 Fed. 405; Rutledge v. Price County, 66 Wis. 35; Lynn v. Morse, 76 Ia. 665; Byington v. Buckwalter, 7 Ia. 512, 74 Am. Dec. 279.

4. Minor, Tax-Titles, 98; Bond v. Pettit, 89 Va. 474, 488, 16 S. E. 666; Harman v. Stearns, 95 Va. 58, 27 S. E. 601.

all the cotenants.⁵ But such tenant is entitled to possession of the whole tract, and to have the lien of the tax sale kept alive until his cotenants repay him their respective proportions of the redemption money.⁶

§ 1377. Same—To Whom Redemption Money Payable.

If the land is purchased at the original tax sale by a *private person*, it is required that the party seeking to redeem shall pay the redemption money to the purchaser, his heirs or assigns.¹ But if the purchaser, his heirs or assigns, refuse to receive it, or do not reside or cannot be found in the county or corporation, the money may be paid to the clerk of the court, who shall endorse the fact of such payment on the "delinquent land-book," opposite the entry of the tract or lot.²

If the land is bought in by the *state* at the tax sale, the redemption money must in all cases be paid to the clerk, who shall endorse it as before.³ So, also, the redemption money is to be paid to the *clerk*, when the land is sought to be redeemed after an application has been made to purchase the land from the commonwealth.⁴

It is also worthy of note that so long as the *state* retains the land the owner may, with the court's consent, for good cause, redeem *part only* of the delinquent land,—a privilege not conferred when the land has been purchased by a *private person* either at the tax sale, or upon resale by the commonwealth.⁵

§ 1378. Same—Period Allowed for Redemption.

This period varies according to the statutory provisions of

5. Minor, Tax-Titles, 98, 99; Hurley v. Hurley, 148 Mass. 444; Maul v. Rider, 51 Penn. St. 377; Watkins v. Eaton, 30 Me. 529, 534, 50 Am. Dec. 637; Ellsworth v. Low, 62 Ia. 178.

6. Minor, Tax-Titles, 99; Hurley v. Hurley, 148 Mass. 444.

1. Va. Code, 1904, § 650.

2. Va. Code, 1904, § 651.

3. Va. Code, 1904, § 664.

4. Va. Code, 1904, § 666.

5. Va. Code, 1904, § 665.

§ 1379 TAX TITLES—AMOUNT OF REDEMPTION MONEY. [Ch. 49

each state. In Virginia, the general period is *two years* from the day of the sale,¹ or from the termination of the disabilities of infancy, coverture (as to estate *not separate estate*),² insanity, or imprisonment, the period of redemption in no case to exceed twenty years.³

But if the state purchases at the tax sale, the owner is allowed to redeem *at any time* while the state retains the land;⁴ and when the state, two years later, sells to a private person, he must serve his application on the owner, after which the latter is given four months longer wherein to redeem.⁵

§ 1379. Same—Amount to Be Paid in Redemption.

The amount to be paid by one seeking to redeem the land is fixed by the statute. It is the sum of all the taxes, levies, penalties, interest and costs *due at the time of the sale*, together with those that have *accrued since*, or would have accrued if the land had not been sold.¹

But the redemption statutes, unlike the taxing statutes, are *remedial* in their nature, and are therefore to be *liberally* construed in favor of the owner. Hence, while the exaction of an excessive tax, however small the amount, invalidates a tax sale,² a slight mistake in the payment of the redemption money will not avoid the redemption. Thus, the payment to the proper of-

1. Va. Code, 1904, § 650.

2. This would seem to be an inadvertence, since there can be no estate of a married woman now in Virginia which is not her separate estate. See Va. Code, 1904, § 2286a.

3. Va. Code, 1904, § 652.

4. Va. Code, 1904, § 664.

5. Ante, § 1374; Va. Code, 1904, § 666. Furthermore, if no tax deed is made to such purchaser within one year after the date of the application (unless hindered by judicial proceedings) the right to redeem revives; and if the deed be not made within two years (unless hindered as above), the land meanwhile remaining unredeemed, the application shall be void, and all amounts paid by the applicant shall be forfeited to the state. Va. Code, 1904, § 666; ante, § 1374.

1. Va. Code, 1904, §§ 650, 650a, 666.

2. Ante, § 1366.

ficial by the owner of five cents less than was due, in order to redeem, was held to be so trifling a mistake as not to be worthy of notice.³

§ 1380. Same—Retrospective Legislation Touching Redemption.

The right of redemption is a mere *special privilege* which may be withdrawn altogether or modified in accordance with the legislative will, without impairing the obligation of a contract or divesting any person of a vested right. There can be no vested right in a special privilege of this kind, a mere rule of law. Hence a statute passed after a tax sale, but applicable thereto, which *shortens* the period of redemption, or which even destroys the right entirely, will be upheld.¹

But so far as the *tax purchaser* is concerned, the transaction is in the nature of a *contract* with the state, and any attempted change which infringes his rights, acquired under the law as it stood at the time of the sale, is unconstitutional as *impairing the obligation of a contract* or depriving him of his vested property rights *without due process of law*. Hence, as against the purchaser, the time of redemption cannot be *extended* after the sale.²

§ 1381. Purchaser's Right to a Tax Deed.

The tax deed completes the purchaser's title to the delinquent land. It gives him the *legal*, where before he had only an *equitable*, title.¹

3. Wyatt v. Simpson, 8 W. Va. 394; Minor, Tax-Titles, 102.

1. Minor, Tax-Titles, 95; Butler v. Palmer, 1 Hill (N. Y.) 324; Cargill v. Power, 1 Mich. 367; Robinson v. Howe, 13 Wis. 341, 346; Negus v. Yancey, 22 Ia. 57; Moody v. Hoskins, 64 Miss. 468; Black, Tax-Titles, § 175; Cooley, Taxation, 545. See Gage v. Stewart, 127 Ill. 207, 11 Am. St. Rep. 116.

2. Minor, Tax-Titles, 95; Cooley, Taxation, 545; Harrison v. Thomas, 103 Va. 333, 49 S. E. 485; Dikeman v. Dikeman, 11 Paige, Ch. (N. Y.) 484; Forqueran v. Donnally, 7 W. Va. 114; Merrill v. Dearing, 32 Minn. 479; Robinson v. Howe, 13 Wis. 341; Gage v. Stewart, 127 Ill. 207, 11 Am. St. Rep. 116; Oullahan v. Sweeney, 79 Cal. 537.

1. Minor, Tax-Titles, 107; Forqueran v. Donnally, 7 W. Va. 114.
(1539)

The purchaser is therefore *entitled* to a tax deed after the expiration of the period of redemption, upon the performance by him of all the conditions precedent imposed by law,² and may *compel* the execution of it,—in Virginia, by motion or petition to the court,³ or by *mandamus*.⁴

It will be remembered that in Virginia the tax deed is to be executed by the clerk of the court, unless he is himself the purchaser, in which case it is to be executed by a special commissioner of the court.⁵ If made by any one else, it is simply *void*, and no tax deed at all.⁶

The deed is not to be executed until the *full expiration* of the redemption period, and if made before that time it is *invalid*.⁷ In the computation of the redemption period the day of sale is excluded. Hence if the period is two years, as in Virginia, a tender of the redemption money on the second anniversary of the sale is in time, and a deed executed on the last day of the two years is premature. And if the last day for redemption falls on Sunday, the right to redeem will generally extend through the next day.⁸

§ 1382. General Requisites of Tax Deed.

In order that the tax deed should have the effect designed to be given to it, it is essential that it be a *valid deed*. Effect can be given to such instruments only in case of a strict compliance

2. Minor, Tax-Titles, 108; Forqueran v. Donnally, 7 W. Va. 114; Woodbury v. Shackelford, 19 Wis. 59; Reed v. Merriam, 15 Neb. 323.

3. Va. Code, 1904, §§ 658, 659, 666.

4. McCullough v. Hunter, 90 Va. 699, 19 S. E. 776; Brooke v. Turner, 95 Va. 696, 30 S. E. 55, 4 Va. Law Reg. 85; People v. New York, 10 Wend. (N. Y.) 395; Aitcheson v. Huebner, 90 Mich. 643, 51 N. W. 634; Minor, Tax-Titles, 109.

5. Va. Code, 1904, §§ 656, 666.

6. Flanagan v. Grimmer, 10 Gratt. (Va.) 421, 434; Bond v. Pettit, 89 Va. 474, 490, 16 S. E. 666.

7. Va. Code, 1904, § 655; Minor, Tax-Titles, 111.

8. Minor, Tax-Titles, 101; Gage v. Davis, 129 Ill. 236, 16 Am. St. Rep. 260; Hare v. Carnatt, 39 Ark. 196; Hill v. Timmermeyer, 36 Kan. 252; Richards v. Thompson, 43 Kan. 209.

with the statutory requirements and if any of these are wanting,—at least, any designed for the protection of the landowner,—there is *no tax deed*.¹ Thus the tax deed, to be valid, must be executed, as we have seen, by the *proper officer* and at the *proper time*.²

If the statute prescribes a particular *form* for the tax deed, that form must be followed, substantially at least; if no special form is prescribed, the deed must be drawn so as to comply with the general legal requirements of a deed.³ Thus, when the statute omits to mention whether a *seal* shall be attached to the tax deed, but the state laws require ordinary deeds of conveyance to be under seal, the seal is necessary.⁴

The Virginia statutes do not prescribe the form of the tax deed, but merely declare that the clerk shall execute *a deed*, with *special warranty*, implying that all the requisites pertaining to ordinary deeds shall apply to tax deeds.⁵ But the omission of the clause of *special warranty*, or the substitution therefor of a clause of *general warranty*, would seem insufficient to invalidate the tax deed at the suit of the landowner, since it is inserted merely for the benefit of the purchaser.⁶

It should be observed also that if the deed is obtained by fraud or unfair practice it is invalid.⁷

§ 1383. Same—Recitals to Be Contained in Tax Deed.

The statutes usually require to be set forth in the tax deed the performance of such preliminary steps as are material to the validity of the tax title, such as the cause of the sale, the listing

1. Virginia B. & L. Co. v. Glenn, 99 Va. 460, 39 S. E. 136.

2. Ante, § 1381.

3. Minor, Tax-Titles, 113; Einstein v. Gay, 45 Mo. 62; State v. Mantz, 62 Mo. 258; Shortridge v. Catlett, 1 A. K. Marsh. (Ky.) 587.

4. Doty v. Beasley, 2 Bibb (Ky.) 14; Shortridge v. Catlett, 1 A. K. Marsh. (Ky.) 587; Sutton v. Stone, 4 Neb. 321; King v. Hyatt, 51 Kan. 504.

5. Va. Code, 1904, §§ 655, 658.

6. Minor, Tax-Titles, 114.

7. Thomas v. Jones, 98 Va. 323, 36 S. E. 382.

and assessment of the property, the notice or advertisement of the sale, the time and place thereof, etc. When such recitals are required, the omission of them or any of them, or a material misrecital of them, renders the deed invalid and of no effect.¹

Thus, the failure to recite the *notice of sale* when required by the statute;² or that the sale was *public*;³ or the omission of recitals of the *time* and *place* of sale, when required;⁴ have all been held to invalidate a tax deed.

In Virginia, the statute provides that the tax deed "shall set forth *all the circumstances appearing in the clerk's office in relation to the sale.*"⁵ It seems to be the design of the legislature to have the tax deed present on its face a complete history of the tax title, as it appears in the records of the clerk's office.

The "circumstances" required to be recorded in the clerk's office have already in the main been outlined in the progress of this discussion; it is needless here to do more than summarize them:

1. The *listing* and *valuation* of the land by the assessors and commissioners of the revenue, as contained in their returns to the court or the clerk;⁶

2. The *levy* of the tax by the commissioner of the revenue;⁷

3. The *list of delinquent taxes*, returned by the county or city

1. Minor, Tax-Titles, 114, 115; *Flanagan v. Grimmer*, 10 Gratt. (Va.) 421, 436; *Buchanan v. Reynolds*, 4 W. Va. 681; *Langdon v. Stewart*, 142 Mass. 576; *Harrington v. Worcester*, 6 Allen (Mass.) 576; *Bender v. Dugan*, 99 Mo. 126; *Wiggin v. Temple*, 73 Me. 382; *McEntire v. Brown*, 28 Ind. 347; *DeFrieze v. Quint*, 94 Cal. 653.

2. *Lagrove v. Rains*, 48 Mo. 536; *Jones v. Miracle*, 93 Ky. 639, 21 S. W. 241.

3. *Daniel v. Case*, 45 Fed. 843.

4. *Smith v. Cox*, 115 Ala. 503, 22 So. 78; *Mason v. Crowder*, 85 Mo. 526; *Crisman v. Johnson*, 23 Colo. 264, 47 Pac. 296; *Baldwin v. Merriam*, 16 Neb. 199.

5. Va. Code, 1904, § 655.

6. Va. Code, 1904, §§ 443, 445, 520; Acts, 1906, pp. 557, 558; ante, § 1359.

7. Va. Code, 1904, §§ 520, 567, et seq.; ante, § 1359. (1542)

treasurer, recorded in the clerk's office in the "delinquent tax book;"⁸

4. The *treasurer's report of sales*, recorded in the clerk's office in the "delinquent land-book;"⁹

5. The *notice or advertisement* of the sale, which appears by way of *recital* in the *treasurer's report of sales*;¹⁰

6. The order of court confirming the sale;¹¹

7. The *surveyor's report*, with plat and certificate showing the metes and bounds of the tract sold, the names of adjoining owners, and giving such further description of the land as will serve to identify it and enable the clerk to describe it properly in the tax deed.¹²

Whether the deed will be invalidated by the failure to recite steps which *should*, but *do not, appear* in the clerk's office, is a question as yet undetermined in Virginia.

§ 1384. Same—Recordation of Tax Deed.

The Virginia statute seems to make the validity of the tax deed, even *as between the parties*, depend upon its due registry. It is enacted that when the purchaser shall have obtained a deed, and the same shall have been *duly admitted to record*, the title to the land sold shall be vested in the grantee therein.¹

§ 1385. Title Conferred upon Purchaser by Tax Deed.

After the tax sale, and prior to the expiration of the redemption period and the execution of the tax deed, the purchaser

8. Va. Code, 1904, §§ 605, 608; ante, § 1362.

9. Va. Code, 1904, §§ 642, 645, 662; ante, § 1373.

10. Va. Code, 1904, § 642; ante, §§ 1363, 1373.

11. Va. Code, 1904, §§ 645, 649, 662; ante, § 1373. See *Delaney v. Goddin*, 12 Gratt. (Va.) 266.

12. Va. Code, 1904, §§ 653, 655. The surveyor's report, however, is not an essential step in the case of city and town lots, though if there be such a report in the clerk's office, it is believed the deed should refer to it. Va. Code, 1904, § 655.

1. Va. Code, 1904, § 661; *Virginia C. Co. v. Thomas*, 97 Va. 527, 34 S. E. 486; *Thomas v. Jones*, 98 Va. 323, 36 S. E. 382; *Leftwich v. City of Richmond*, 100 Va. 164, 40 S. E. 651.

has an *equitable* interest, defeasible if the owner redeems.¹ And the Virginia statute provides that he may, after confirmation of the sale by the court, *enter* and hold possession of the land sold, provided the owner is *not in actual possession* thereof; or if the latter is *in possession*, the purchaser may require him to redeem the land within sixty days, which if he fails to do the purchaser may *enter and take possession*.²

After the execution of a *valid* tax deed, the purchaser's pre-existing *equitable* title merges in the *legal title*, the general rule being that such an interest is vested in the grantee in the deed as formerly belonged to the delinquent tax payer, whether in fee simple or for life, but *free from all liens, conditions or incumbrances*.³

This is the rule adopted in Virginia, the statute enacting that when the purchaser, his heirs or assigns, has obtained a deed, and the same has been duly admitted to record, the right or title to such real estate shall stand vested in the grantee in such deed, as it was vested in the party *assessed with the taxes* on account whereof the sale was made, at *the commencement of the year* for which such taxes were assessed, or in any person claiming under such party.⁴

1. Minor, Tax-Titles, 157; Jones v. Dils, 18 W. Va. 759; Watkins v. Eaton, 30 Me. 535, 50 Am. Dec. 637.

2. Va. Code, 1904, § 646.

3. Minor, Tax-Titles, 158; Langley v. Chapin, 134 Mass. 82; Becker v. Howard, 66 N. Y. 5; Kelso v. Kelly, 14 Penn. St. 204; Lacey v. Davis, 4 Mich. 140, 66 Am. Dec. 524.

4. Va. Code, 1904, § 661. See Simmons v. Lyle, 32 Gratt. (Va.) 752; Thomas v. Jones, 94 Va. 756, 27 S. E. 813; Tabb v. Com., 98 Va. 47, 51 L. R. A. 283, 34 S. E. 946, 5 Va. Law Reg. 740; Glenn v. West, 106 Va. 356, 56 S. E. 143. The statute, as it formerly read, omitted the concluding clause, "or in any person claiming under such party." Under this state of the law a case arose which caused the latter clause to be inserted. In that case, Terry conveyed some land in 1864 to Robertson, by deed unrecorded, who paid taxes on it, though it remained listed on the land-books in Terry's name. But the land was returned delinquent for the tax of 1865, amounting to \$16. It was thereupon sold for taxes and purchased by Gates at that price, the land being actually worth upwards of \$5,000. Gates, having obtained (1544)

§ 1386. Curative Effect of Tax Deed.

According to the great weight of authority, in the absence of a statutory provision to the contrary, the tax deed is of no effect whatever as evidence of the purchaser's title nor of the proper performance of the various mandatory steps prescribed by the law for the owner's protection, whether or not they are required to be *recited* in the deed, or are in fact recited therein. The burden is still on the *tax purchaser* to show that all these preliminary steps have been complied with. The deed is not in general even *prima facie* evidence of the truth of the facts it recites. Proof of the legality of the sale and of the regularity of the proceedings must be made *aliunde*.¹

But it has now become the practice in many states to provide that a tax deed shall be *prima facie* evidence of the regularity of *all*, and *conclusive* evidence of the regularity of *most*, of the steps preliminary or subsequent to, and contemporaneous with, the sale.

Thus, the Virginia statute provides that the tax deed shall vest such title in the grantee as is described in the preceding section, "subject to be defeated only by proof, (1) that the taxes for which the land was sold were *not properly chargeable* thereon; or (2) that the taxes have been *paid*; or (3) that the *notice* of the sale, where made to a person other than the commonwealth, or the notice of the application to purchase in case of a resale by the state, has not been duly given; or (4) that the *payment*

a tax deed, brought an action of ejectment against Lawson, Robertson's tenant, to obtain possession of the land. The land being assessed in Terry's name at the commencement of the year 1865, it was held under the statute then in force that Gates took only such title as was vested in Terry *at that time*, and that, since Terry had in 1864 sold his interest to Robertson, Gates took no title at all. Gates *v. Lawson*, 32 Gratt. 12.

1. *Minor*, Tax-Titles, 123; *Nalle v. Fenwick*, 4 Rand. (Va.) 585; *Christy v. Minor*, 4 Munf. (Va.) 431; *Flanagan v. Grimmer*, 10 Gratt. (Va.) 421; *Gage v. Kaufman*, 133 U. S. 471; *Brown v. Goodwin*, 75 N. Y. 409; *Jackson v. Shepard*, 7 Cow. (N. Y.) 88, 17 Am. Dec. 502, note; *Alvord v. Collins*, 20 Pick. (Mass.) 418; *Emery v. Harrison*, 13 Penn. St. 317; *Collins v. Doe*, 33 Ala. 91; *Johnson v. Phillips*, 89 Ga. 286.

(1545)

or *redemption* was prevented by *fraud* or *concealment* on the part of the purchaser; provided that no suit shall be brought to set aside, cancel, or annul such deed, *except for fraud*, as herein provided, unless *within two years* after the same is duly admitted to record."²

Under the first of these heads, namely, that the taxes are *not properly chargeable* on the land, the owner may show *within two years* (notwithstanding the execution of a tax deed):

1. An improper or unlawful *listing* of the land for taxation, including a misleading description of the land or of the owner,³ or the listing of land exempt from taxation;⁴

2. An improper *valuation* of the land listed;

3. An improper or excessive *levy* of the tax by the commissioner of the revenue;

4. The *unconstitutionality of the law* under which the tax is levied.

Under the second head, it may be shown (notwithstanding the tax deed) that the taxes had been *paid*, and probably that the land had been lawfully *redeemed*.⁵

Under the third head, the *want of due notice* may be shown.

Under the fourth head, *fraud* or *concealment* may be shown, whereby the owner is prevented from *paying the taxes* or *redeeming the land*.

As to all steps or circumstances relating to the sale, other than those referable to one or the other of these four heads, the tax deed (supposing it to have been validly executed) is made *conclusive* evidence of the validity of the purchaser's title; and it is made *prima facie* evidence even of these, ripening into conclusive evidence after the lapse of two years as to *all*, save in cases of *fraud*.⁶

2. Va. Code, 1904, § 661.

3. See *Stevenson v. Henkle*, 100 Va. 591, 42 S. E. 672.

4. *Petersburg v. Association*, 78 Va. 431.

5. *Minor*, Tax-Titles, 152.

6. Va. Code, 1904, § 661.

§ 1387. Constitutionality of the Virginia Curative Statute.

It is a general principle of constitutional law, applicable to curative statutes, that the legislature may cure the omission or irregular performance of any act which it might originally have *constitutionally dispensed with altogether*, but in respect to acts or steps which are *jurisdictional*, and which it is beyond the constitutional power of the legislature to have *originally omitted*, it cannot by retroactive legislation *cure* the omission or irregular performance of them. Such steps or acts are part of the "due process of law," which, under the fourteenth amendment to the federal constitution, no state can dispense with.¹

It follows therefore that it is not constitutionally competent for the legislature unqualifiedly to make the tax deed *conclusive* of a compliance with such *jurisdictional* prerequisites as constitute "due process of law" in the acquisition of a tax title. Such an enactment would conflict with the fourteenth amendment, as tending to deprive the owner of his property without due process of law, and would be unconstitutional to the extent of such conflict.²

But it is one thing to provide that a tax deed shall at all events and under all circumstances be *conclusive* evidence of a tax title, and quite a different thing to declare that it shall be deemed conclusive *after a certain reasonable time*, or in *collateral proceedings*;³ or that the deed shall be only *prima facie* evidence

1. Minor, Tax-Titles, 125; Marx v. Hawthorn, 148 U. S. 172, 30 Fed. 579; Sturges v. Carter, 114 U. S. 511; Kelley v. Herrell, 20 Fed. 364; McCready v. Sexton, 29 Ia. 356, 4 Am. Rep. 214, 228; Astor v. New York, 62 N. Y. 580; Rollins v. Wright, 93 Cal. 395; Tracy v. Reed, 38 Fed. 69, 2 L. R. A. 773, note; Davis v. Minge, 56 Ala. 121.

2. Minor, Tax-Titles, 126; McCready v. Sexton, 29 Ia. 356, 4 Am. Rep. 214, 229; Houseman v. Kent, 58 Mich. 364; Greene v. Williams, 58 Miss. 752; People v. Lynch, 51 Cal. 51.

3. Minor, Tax-Titles, 127; Va. Coal Co. v. Thomas, 97 Va. 536, 34 S. E. 486, 5 Va. Law Reg. 556, note; Flanagan v. Grimmer, 10 Gratt. (Va.) 421, 435; Ostrander v. Darling, 127 N. Y. 70; Bronson v. Lumber Co., 44 Minn. 348; Bull v. Kirk, 37 S. C. 395; Doremus v. Cameron, 49 N. J. Eq. 1; Johnston v. Sutton, 45 Fed. 296. It may perhaps be
(1547)

of the jurisdictional facts.⁴ Such provisions are constitutional and valid.⁵

We have already indicated what are these steps in the acquisition of a tax title, which are to be regarded as jurisdictional and part of due process of law.⁶ In brief, they are (1) The listing; (2) The valuation; (3) The levy; (4) The initial and continued liability of the taxpayer for the tax; (5) Notice of the time and place of sale; (6) An actual sale; (7) At the time and place appointed; (8) A sale public, *bona fide* and without fraud.

It will be observed that the Virginia statute *in terms* embraces the *first five* of these, making the tax deed only *prima facie* evidence of their proper performance or existence, until after the lapse of *two years* (a reasonable time), when it is made conclusive; all of which is within the limits of the constitutional principles just considered.⁷

The statute does not *in terms* embrace the sixth, seventh and eighth circumstances above mentioned, but they may perhaps be included under the *fourth* head of the statute providing that, despite the tax deed, the owner may show *fraud* or *concealment* whereby he is prevented from paying the tax or redeeming the land, though it must be admitted such a construction would be rather forced.⁸

But if by a proper construction of the statute these circumstances cannot be shown under the fourth head, they may be shown despite it, for an *actual, public, bona fide* sale, at a time open to doubt whether a tax deed, even after a reasonable time, may be made conclusive against the owner, if the purchaser do not *take possession* of the land or the owner be otherwise notified of the adverse claim of the purchaser, supposing the *listing* or other constitutional means of notification to be wanting.

4. Minor, Tax-Titles, 127; McCready v. Sexton, 29 Ia. 356, 4 Am. Rep. 214, 236; Callanan v. Hurley, 93 U. S. 387.

5. See authorities cited *supra*, notes 2, 3, 4.

6. Ante, § 1358.

7. See *supra*, note 3.

8. See Va. Code, 1904, § 661.

and place appointed, whereof the owner must be *notified*, is the very foundation of the purchaser's title, and constitutes the very opportunity to the owner to prevent the sacrifice of his property which "due process of law" demands he shall have.⁹

9. Minor, Tax-Titles, 144, et seq.; Cooley, Taxation, 489; Callanan v. Hurley, 93 U. S. 387; Kelley v. Herrall, 20 Fed. 364; McCready v. Sexton, 29 Ia. 356, 4 Am. Rep. 214; Martin v. Cole, 38 Ia. 141; Trusdell v. Green, 57 Ia. 215; In re Lake, 40 La. Ann. 142; Huey v. Van Wie, 23 Wis. 613; Burdick v. Bingham, 38 Minn. 482; Conway v. Cable, 37 Ill. 82; Wisner v. Davenport, 5 Mich. 501; Griffin v. Ellis, 63 Miss. 351; Henderson v. White, 69 Tex. 103; Nance v. Hopkins, 10 Lea (Tenn.) 508; In re Tax-Sale, 42 Md. 196; Russell v. Hudson, 24 Kan. 571.

(1549)

CHAPTER L.

REGISTRY OF TITLE.

- § 1388. Outline of Discussion.
- 1389. Origin and Purposes of Registry Laws.
- 1390. The Conveyances and Other Transactions Touching Land to Which the Registry Laws Are Applicable.
- 1391. Time within Which Registry Is to Be Made.
- 1392. Place of Registry.
- 1393. The Nature of Registry.
- 1394. Modes of Authenticating Instruments for Registry.
- 1395. I. Proof by Two Witnesses.
- 1396. II. Authentication by Acknowledgment—Discussion Outlined.
- 1397. Officials Authorized to Take Acknowledgments.
- 1398. Effect of Acknowledgment Taken by a Party to the Writing.
- 1399. Form of Certificate of Acknowledgment.
- 1400. Effect of Acknowledgment.
- 1401. Effect of Registry as between the Parties.
- 1402. Effect of Registry as to Third Persons.
- 1403. Index to Records as Notice to Third Parties.
- 1404. I. Who Are the "Creditors" Protected by the Registry Laws.
- 1405. What Instruments Required to Be Registered as to Creditors.
- 1406. II. Who Are the "Purchasers" Protected by the Registry Laws.
- 1407. 1. The Purchaser Must Be a Subsequent Purchaser.
- 1408. 2. The Subsequent Purchaser Must Be a Purchaser for Value.
- 1409. 3. The Purchaser Must Be a "Complete Purchaser."
- 1410. Illustrations of Doctrine of Complete Purchaser.
- 1411. 4. Purchaser Must Be without Notice of Prior Conveyance or Incumbrance.
- 1412. A. Notice Must Be Clear.
- 1413. B. What Amounts to Actual Notice.
- 1413. C. What Amounts to Constructive Notice—In General.
- 1414. Effect of Registry as Constructive Notice.

(1550)

§ 1415. Conflicts under the Registry Statutes.

1416. 1. Conflicts between Lien Creditors.

1417. 2. Conflicts between Purchasers of the Same Tract.

1418. 3. Conflicts between Creditors on the One Side and Purchasers on the Other.

§ 1388. Outline of Discussion.

This very important subject may perhaps be best unfolded by considering the following main heads: (1) The origin and purposes of the registry laws; (2) The conveyances and other transactions touching land to which the registry laws are applicable; (3) The time within which the registry must occur; (4) The place of registry; (5) The nature of registry; (6) The modes of authenticating instruments for registry; (7) The effect of registry; and (8) Conflicts under the registry laws.

§ 1389. Origin and Purposes of the Registry Laws.

The common law does not require any deed or writing in order to pass the title to lands, and of course, therefore, knows nothing of the doctrine of *registry*. The only notoriety which it demands in such transactions, and the only one compatible with the illiteracy of ancient Anglo-Norman society, is *livery of seisin* for estates of freehold, and *entry* for estates for years.¹

The first essay towards the policy of registering conveyances, other than conveyances of record, such as fines and common recoveries, is to be found in the statute of *Enrollments* (27 Hen. VIII, c. 16), which is an appendage to the famous statute of *Uses* (27 Hen. VIII, c. 10). The framers of the statute of *Uses* could not fail to perceive that, by means of its provisions, estates, even of *inheritance*, in lands might be created and transferred *by deed merely*, without actual livery of seisin, and, therefore, with a *secrecy* eminently promotive of fraud, and inconvenient to society; and it was, therefore, enacted by the statute of *Enrollments*, at the same session of parliament which passed the statute of *Uses*, that conveyances by *bargain and sale* (which were

1. 2 Min. Insts. 937; ante, § 143, et seq.

the more likely to be prostituted to bad ends), should not enure to pass a *frechold* unless the same were by "writing *indented, sealed and enrolled*" in one of the courts of Westminster, or else with the *custos rotulorum* of the county, within six months after the date of the writing. Clandestine bargains and sales of *terms for years* were deemed not worth regarding, such interests, indeed, having been perfectly precarious, and subject to the caprice or good faith of the lord, until about six years before, when, by statute 21 Henry VIII, c. 15, the termor was protected against those fictitious *recoveries* whereby previously he was liable to be at any moment divested of his estate.²

The policy thus hesitatingly and imperfectly inaugurated was almost immediately frustrated by the ingenious adaptation of the *lease and release* to the purpose of conveying the title to lands,³ whereby conveyances might be as secret as could be desired. Nor does parliament appear to have made any further effort to prevent so mischievous a result until the statute 2 & 3 Anne, c. 4 (A. D. 1704), which, together with several subsequent statutes, provided for a general registry of conveyances in the counties of York and Middlesex; and with so little favor were these attempts regarded, that so philosophic an observer as Blackstone, after fifty years' experience, speaks more than doubtfully of the utility of their results. "However plausible," says he, "these provisions may appear in theory, it hath been doubted by very competent judges whether more disputes have not arisen in those counties by the inattention and omission of parties, than prevented by the use of the registers."⁴

In Virginia, and generally in the United States, the legislature has been far more alive to the advantages of a general registration of all conveyances of, liens on, and transactions affecting lands, and the system (which was begun with us so early as 1639-'40) has been gradually perfected, until it is believed there is practically nothing touching the title to lands which it con-

2. 2 Min. Insts. 938; 2 Bl. Com. 338; Bac. Abr. Barg. & Sale (E).

3. Ante, § 1234; 2 Min. Insts. 810, 938.

4. 2 Min. Insts. 938; 2 Bl. Com. 343.

cerns a purchaser or creditor to know which is not required to be set down in the registry of the county or corporation where the land is, and that registry is made so convenient of access that for one to be deceived argues, in general, a negligence so gross as to exclude sympathy for the sufferer.⁵

§ 1390. The Conveyances and Other Transactions Touching Land to Which the Registry Laws Are Applicable.

The conveyances and other transactions relating to land, the registry of which is, by statute in Virginia, made notice as to subsequent *purchasers* for value and without notice, or as to *both such purchasers and as to creditors*, may be enumerated as follows:

1. Any *contract* made in respect of real estate *in consideration of marriage*; or any *contract* made for the *conveyance or sale* of real estate or a *term* therein for *more than five years*. Here registry is notice both as to subsequent *purchasers* and as to *creditors*.¹

2. Every *deed*, conveying any such estate or term, in which case also the registry is notice to *creditors* as well as to subsequent *purchasers* of the land for value and without notice;²

3. Every *deed of trust* or *mortgage* upon land. The registry of these is also notice to *creditors* as well as *purchasers*.³

4. Partitions of land, assignments of dower therein, judgments or decrees for land, and condemnation proceedings therefor. The registry of these is presumably notice both to purchasers and creditors.⁴

5. Every transaction creating a *mechanic's lien*. The statute

5. 2 Min. Insts. 939; 1 Hen. Stats. 227, 248, 419, 472.

1. Va. Code, 1904, §§ 2463, 2464.

2. Va. Code, 1904, § 2465. A *quitclaim* deed (which purports to convey only such interest as the grantor has) *ipso facto* puts a subsequent purchaser from the grantee therein *upon notice* that there are adverse claims to the land, so that he ceases to become a purchaser "without notice" thereof. Va. & Tenn. Coal & I. Co. v. Fields, 94 Va. 102, 26 S. E. 426; ante, § 1211.

3. Va. Code, 1904, § 2465.

4. Va. Code, 1904, §§ 2510, 1105f (cl. 21). But see 2 Min. Insts. 952. (1553)

prescribes that the registry of this lien shall be notice to “all persons;”⁵

6. Any agreement *in writing* creating a *lien on crops* to be made during the year, for advances of money or supplies to agriculturists. The registry here is notice to subsequent *purchasers*, at least, and probably to *creditors* also;⁶

7. *Vendor's liens*, by virtue of the statute requiring such liens to be expressly reserved on the face of the conveyance,⁷ and the other statute, already referred to requiring all conveyances to be registered in order to be valid as against *creditors* and subsequent *purchasers* for value and without notice;⁸

8. *Delinquent taxes* upon real estate,—as against *creditors* as well as *purchasers*;⁹

9. Every *judgment, decree* or order for the payment of *money*. The recordation or “docketing” of these constitutes notice as against *subsequent purchasers* for value and without notice only;¹⁰

10. Every *lis pendens* touching real estate. The recordation of

5. Va. Code, 1904, § 2476; ante, § 715, et seq.

6. Va. Code, 1904, §§ 2494, 2496. See Acts, 1906, p. 104.

7. Va. Code, 1904, § 2474.

8. Va. Code, 1904, § 2465. A subsequent *purchaser*, however, takes with notice of the deed to his grantor and its contents, even though it be not recorded. Post, § 1413, note 2. The unregistered deed (containing the reservation of the vendor's lien) is declared void as to “creditors” (with or without notice). Va. Code, 1904, § 2465. Whether this means creditors of the *grantor* only, or whether, *quoad the vendor's lien*, the statute protects also the creditors of the *grantee* in the unregistered deed is uncertain, but in view of the statutory definition of “creditors,” it would seem to protect the latter as well as the former. For it is enacted that the term “creditors” shall “not be restricted to the protection of creditors of the *grantor*, but shall extend to and embrace *all creditors* who, but for the (unregistered) deed or writing would have had a right to subject the property conveyed to their debts.” Va. Code, 1904, § 2472; ante, § 1171; post, § 1404.

9. Va. Code, 1904, §§ 456, 636, 636a; ante, § 1357.

10. Va. Code, 1904, §§ 3559, 3560, 3570; ante, § 700. The judgments and decrees of the federal courts may likewise be recorded with the same effect. Va. Code, 1904, §§ 3559, 3559a; ante, § 701.
(1554)

these is notice to *subsequent purchasers only*,¹¹ save in case of a suit to set aside a fraudulent conveyance, in which case the recordation of a *lis pendens* is notice to *creditors* as well as *subsequent purchasers*;¹²

11. Every *attachment* against real estate. The recordation is notice to *subsequent purchasers only*;¹³

12. Liens of the *Mutual Assurance Society* of Virginia for premiums. The recordation is notice to *subsequent purchasers only*;¹⁴

13. *Wills of lands*. The recordation is notice to *purchasers only*;¹⁵

14. *Written acts of re-entry* upon land for condition broken. The statute declares that these when duly registered, shall constitute evidence *in all cases* of the facts therein set forth.¹⁶

While the registry of all these instruments for conveying, incumbering or charging lands is important in the examination of titles to real estate, as will appear hereafter,¹⁷ the principles of registry have their main application in the case of (1) conveyances, contracts to convey, deeds of trust and mortgages, and (2) the liens of judgments or decrees, attachments and *lis pendens*;—the first of these classes being void both as to *subsequent purchasers* for value and without notice and as to *creditors*, unless they are duly admitted to record; while the second class (except the lien of a *lis pendens* in one particular case)¹⁸ are required to be recorded as against *subsequent purchasers alone*.

§ 1391. Time within Which Registry Is to Be Made.¹

It is now provided in Virginia, after various experiments, that

11. Va. Code, 1904, § 3566; ante, § 711.

12. Va. Code, 1904, § 2460.

13. Va. Code, 1904, § 3566; ante, § 710.

14. Va. Code, 1904, § 2498b.

15. Va. Code, 1904, §§ 2547, 2547a; ante, § 1281.

16. Va. Code, 1904, § 2802; ante, § 539; 2 Min. Insts. 277.

17. Post, §§ 1392.

18. In case of a suit to set aside a fraudulent conveyance. Va. Code, 1904, § 2460.

1. The registry policy began in England with the *statute of Enrollments* (27 Hen. VIII, c. 16), which required deeds of *bargain* (1555)

deeds of trust, mortgages, mechanic's liens, judgments and decrees for money, *lis pendens* and attachments, shall be of no

and sale of freeholds to be registered within six months from the date, or otherwise to be *void*, even, it would seem, *as between the parties*. 2 Min. Insts. 946; Bac. Abr. Barg. & Sale. The statutes 2 & 3 Anne, c. 4, 6 Anne, c. 35, 7 Anne, c. 20, and 8 Geo. II, c. 6, declared all deeds and conveyances affecting lands in the West, East or North Riding of Yorkshire, or in the county of Middlesex, to be void against any *subsequent purchaser or mortgagee for valuable consideration*, unless registered *before the registering* of the deed or conveyance under which such subsequent purchaser or mortgagee shall claim, but did not otherwise prescribe the time within which the registry should be made. 2 Min. Insts. 946; 2 Lom. Dig. 476.

The first registry law enacted in Virginia (A. D. 1639, 1640, 14 Car. I.), contemplated, like 27 Hen. VIII, c. 16, an *absolute avoidance* of the conveyance unless it were recorded. The terms of that statute were as follows: "A deed or mortgage made *without delivering of possession*, to be adjudged *fraudulent* unless entered in some court." 1 Hen. Stats. 227. The second act (A. D. 1642-43, 18 Car. I.), is much more formal, but to the same effect as to *mortgages*, namely, that every conveyance by way of mortgage shall be adjudged *fraudulent*, and to all intents and purposes *void*, unless registered in the quarterly or monthly court, or accompanied by the *actual delivery of possession*. 1 Hen. Stats. 248. The next act *extant* (A. D. 1653-'7, Com'th), confirms the previous enactments (one of which, passed at the session 30th April, 1652, does not survive), applying them to *all conveyances*, and adds that the registry shall be within six months from the alienation, and that delivery of possession shall not dispense with it. 1 Hen. Stats. 417, 418. Thenceforward, until 1813, the successive registry laws enforced the same principle, without distinguishing between mortgages and absolute conveyances, namely, that they must be recorded, or *lodged with the clerk* to be recorded, within a limited time—more recently within *eight months* from their date,—in which event they would take effect, *by relation*, from their date, and have priority over intermediate conveyances; but if not lodged with the clerk to be recorded within the prescribed period, they were void even *as to the parties*, until 1734, 4 Hen. Stats. 397-'8; and, after 1734, void *as to creditors*, and *as to subsequent purchasers* for value and without notice, without the possibility of being revived by a subsequent registry, which was without effect, and nugatory as to *everybody*, including the parties, until 1734, and thence until 1813, *as to creditors and purchasers*. 2 Min. Insts. 946.

Courts of record, indeed, might and did exercise the *common law* (1556)

effect as to certain third parties until they are *duly admitted to record*.²

As to *contracts* touching land and *deeds of conveyance*, the statute, while providing generally that these transactions shall be void, as to subsequent purchasers for value and without notice and as to creditors, *until and except* from the time they are duly admitted to record,³ makes the special qualification that "any such writing which is admitted to record *within ten days* from the day of its being *acknowledged* before and certified by a justice, notary or other person authorized to certify the same for record, shall (*unless it be a mortgage or a deed of trust not in*

power of spreading conveyances and other instruments upon their records for safekeeping, and if the deed were recorded upon the party's acknowledgment, an exemplified copy (or doubtless an office copy, with us), would be evidence against the grantor and those claiming under him; but it would have none of the privileges, under the statute, of a recorded deed. Heron v. U. S. Bank, 5 Rand. (Va.) 427-8; 2 Min. Insts. 946, 947.

By act of 1813, the power was conferred upon the *courts of registry*, but *not upon the clerk in his office*, to admit deeds to record notwithstanding the lapse of eight months, to take effect as to creditors and subsequent purchasers for value and without notice, from the *time of such recording*, and from *that time only*. Heron v. U. S. Bank, 5 Rand. (Va.), 429, 430; 2 Min. Insts. 947. And since 1819, 1 Rev. Code, 1819, p. 364, c. 99, § 12, the law has distinguished between *mortgages and deeds of trust*, on the one side, and *all other conveyances, covenants, agreements, and deeds*, on the other; giving effect to the former only when they should be delivered to the clerk to be recorded; whilst as to the latter, it was provided by the Code of 1819, that if they were acknowledged, proved, or certified according to law, and delivered to the clerk of the proper court, to be recorded, *within eight months* after the sealing and delivery thereof, they should take effect and be valid, as to all persons, from the *time of such sealing and delivery*. The Code of 1849 and the later Codes retain substantially the same distinction, save that they require the time within which the registry is to occur to be computed from the date of *acknowledgment*, instead of from the *sealing and delivery* of the deed, and reduce very substantially the time within which the registry is to be made. 2 Min. Insts. 947.

2. Va. Code, 1904, §§ 2465, 2467, 2477, 3559, 3559a, 3566, 3570.

3. Va. Code, 1904, § 2465.

consideration of marriage) be as valid as to creditors and subsequent purchasers as if such admission to record had been on the day of such acknowledgment and certificate."⁴

Where several writings, embracing the same property, are admitted to record on the *same day*, if the case is not otherwise provided for by statute, the one *first admitted to record* shall have priority.⁵

The period for registry is not restricted by the terms or policy of the statute to the *lifetime* of the grantor, and may take place *after his death*; and in such case a deed of trust to secure debts will have precedence over the decedent's *general creditors*, having no specific lien and that whether the decedent dies intestate, or leaves a will charging his lands with the payment of his debts, because in either case the general creditors are entitled to

4. Va. Code, 1904, § 2467. As the law stood prior to the Code of 1849, eight months from the *date of the deed* (that is, from its *delivery*) was allowed within which to have it recorded, so that, if recorded at any time within that period, the registry would relate back to the date of delivery, and take effect as to third persons as if then recorded. 2 Min. Insts. 734. Under this state of the law, it was repeatedly held that, after the lapse of the eight months, the deed might be *redelivered*, and if recorded within eight months thereafter, it would have relation to such redelivery, as if the deed had then for the first time been executed. 2 Min. Insts. 734; 2 Lom. Dig. 36; Eppes v. Randolph, 2 Call (Va.) 125, 151; Roanes v. Archer, 4 Leigh (Va.) 550, 565.

And though the law is now changed so as to require an admission to record within *ten days* of the date of *acknowledgment*, yet by analogy to the state of the law as it existed prior to 1850, it seems that if the writing were *reacknowledged* before a justice, etc., and recorded within ten days thereafter, the registry would have relation to the *reacknowledgment* (just as it would have had relation to a first or original acknowledgment), notwithstanding more than ten days might have elapsed since the original acknowledgment. 2 Min. Insts. 947. Eppes v. Randolph, *supra*; Colquhoun v. Atkinson, 6 Munf. (Va.) 550; Com. v. Selden, 5 Munf. 160; Roanes v. Archer, *supra*.

5. Va. Code, 1904, § 2469. The old rule, prior to 1849, was that the one *first executed* should take priority. Naylor v. Throckmorton, 7 Leigh (Va.) 98, 106, 30 Am. Dec. 492; 2 Min. Insts. 948. (1558)

subject no more than the interest *remaining in the decedent* at his death.⁶

It must be observed, finally, upon this head, that the *impossibility of registering the writing*, as because unavoidable accidents prevent the attendance of the witnesses who are to prove it, or by reason of the casual loss or destruction of the writing itself, does not avert the legal consequence of its being therefore void as to creditors and subsequent purchasers for value, and without notice.⁷ Thus, in *Withers v. Carter*,⁸ Triplett, in pursuance of a *previous contract* in writing, on January 25, 1834, executed and duly acknowledged a deed of land in Loudoun County to Carter, and Carter, as it seems, on the same day, committed the deed to his son to be delivered to the clerk of the county court of Loudoun for record, and by the son it was lost, and was never found, and consequently was never recorded. Meanwhile, certain *creditors* of Triplett, having obtained *judgment* against him at a term of the court of the county of Frederick, commencing 26th January, 1835 (one day *after* the execution of the lost deed), attempted to subject the land in the hands of Carter to those judgments. It was held that the *lost deed unregistered* was, by the statute, void as to those creditors, and could not be set up as against them.⁹

It has been questioned, in case of a deed *lost before recordation*, the grantor making a new deed to the grantee who has that recorded, whether the recordation of the *second deed* should

6. 2 Min. Insts. 948; *McCandlish v. Keen*, 13 Gratt. (Va.) 630, et seq.; *Collup v. Smith*, 89 Va. 258, 15 S. E. 584.

7. 2 Min. Insts. 948; *Eppes v. Randolph*, 2 Call (Va.) 185; *Harvey v. Alexander*, 1 Rand. (Va.) 240, 10 Am. Dec. 519; *Withers v. Carter*, 4 Gratt. (Va.) 407, 50 Am. Dec. 78.

8. 4 Gratt. (Va.) 407, 413, 416, 50 Am. Dec. 78.

9. 2 Min. Insts. 948. However, it was also held in that case that the *previous executory contract* for the land created an *equity* in Carter as to the creditors, which the abortive attempt (abortive *as to them*) to execute a conveyance did not supersede; the law not then avoiding *unregistered executory contracts* for land, as to creditors and purchasers, as it does now. Va. Code, 1904, §§ 2464, 2465; 2 Min. Insts. 948.

operate as notice to creditors and subsequent purchasers.¹⁰ But it is now decided in Virginia that, since the first deed is *void* as to creditors and purchasers until recorded, there still remains in the grantor a *scintilla juris*,—a spark of right,—at least as to creditors and purchasers,—upon which a second deed may operate, and that the registry of such second deed will operate as notice to creditors and subsequent purchasers.¹¹

§ 1392. Place of Registry.

The quite universal rule in Virginia is that a contract, conveyance, or transaction affecting real estate, is to be registered or recorded in the clerk's office of the court of the *county or corporation* wherein *the real estate may be*; and if it lies in more than one county or corporation, the registration must be made in each and every one, in order to be valid as to so much as may be therein.¹

The principal, if not indeed the only, exception to this rule is in the case of *current delinquent taxes*, which are to be found in

10. See *Building, etc., Co. v. Fray*, 96 Va. 559, 32 S. E. 58; 4 Va. Law Reg. 838, 839, note.

11. *Bankers' Loan & Inv. Co. v. Blair*, 99 Va. 606, 86 Am. St. Rep. 914, 39 S. E. 231.

1. 2 Min. Insts. 942; Va. Code, 1904, §§ 2466, 2467, 2476, 2503, 2504, 3559, 3559a, 3565, 3570, etc. Previous to the Code of 1849, the requirement was that the registry should take place in "the county, city or corporation in which *the land, or part thereof, lieth*." 1 Rev. Code, 1819, 362, ch. 99, § 2, thus raising perplexing questions as to whether, when the land lay contiguously, but in different counties, it constituted *one tract*, in which case *one registration* sufficed, or consisted of several tracts, when a registration in each county was requisite. This was one of the questions in *Horsley v. Garth*, 2 Gratt. (Va.) 490, 44 Am. Dec. 393, and it was there determined that, although land may have been held by the proprietor, and by him offered for sale as one tract, yet, where a navigable stream is the dividing line between two counties, and so separates the land as to throw part on one side of the stream, and part on the other, the parts so separated must be regarded as *distinct tracts*, and the registry must take place in *both counties*. All doubt, however, upon the subject is very prudently obviated by the provisions above cited. 2 Min. Insts. 943. (1560)

the *office of the treasurer* of the county or corporation wherein the land lies, until such time as he makes his return to the clerk of the court, which he is not required to do until after the taxes have become delinquent.² After this time, these, as well as taxes delinquent for previous years, if any, will be found in the *clerk's office* in a book known as the "*Delinquent Tax Book*,"³ or if the land is ready to be *sold* for the delinquent taxes, or has already been sold to the *commonwealth*, in another book in the clerk's office designated the "*Delinquent Land-Book*."⁴

In the clerk's office there are kept several distinct sets of record books, in one or the other of which are to be found all the liens, transfers or other transactions required to be recorded. These sets of records are as follows:

1. *The Deed Books.*

These contain not only the recorded copies of all deeds, deeds of trust, mortgages and vendor's liens that have been duly admitted to record,⁵ but also all contracts touching land in consideration of marriage and contracts to convey or sell land or to lease the same for more than five years;⁶ all powers of attorney authorizing the conveyance of land;⁷ all attachments and liens of *lis pendens*;⁸ all partitions of land, assignments of dower therein, and judgments or decrees for land;⁹ condemnation proceedings with regard to land;¹⁰ the liens of employees, etc., of transportation companies upon the franchises and property of the company;¹¹ the liens on crops for money or supplies advanced to agriculturists;¹² and written acts of re-entry.¹³

2. Va. Code, 1904, §§ 608, 611, 612; ante, § 1362.

3. Va. Code, 1904, § 611.

4. Va. Code, 1904, §§ 645, 662; ante, § 1373.

5. Va. Code, 1904, §§ 2465, 2474.

6. Va. Code, 1904, § 2467.

7. Va. Code, 1904, §§ 2499, 2500, 2509.

8. Va. Code, 1904, § 3565.

9. Va. Code, 1904, § 2510.

10. Va. Code, 1904, § 1105f (cl. 21).

11. Va. Code, 1904, §§ 2485, 2486.

12. Va. Code, 1904, §§ 2494, 2496.

13. Va. Code, 1904, § 2802.

2. *The Judgment Docket Books.*

These contain all the records of the judgments and decrees for money of the *state* courts of Virginia, and also, for the most part, the judgments and decrees for money of the *federal* courts.¹⁴

3. *The Will Books.*

Herein are recorded, after probate, all the wills of lands situated in the county or corporation to which the clerk's office belongs.¹⁵

4. *The Mechanics' Lien Record.*

Herein are recorded the liens of mechanics, artisans, etc., both general contractors and subcontractors.¹⁶

5. *The Delinquent Tax and Land-Books.*

In these will be found the taxes for which the land is delinquent, save only those for the current year, which have not yet been returned by the treasurer of the county or corporation as delinquent, which latter will be found in the *treasurer's office*.¹⁷

6. *The Mutual Assurance Society's Lien Book.*

The Mutual Assurance Society of Virginia is a corporation chartered at an early period, which, by the terms of its charter, has a lien upon the houses and land insured by it for the premiums. Formerly inquiry as to the existence of these liens had to be made at the office of the company in Richmond, but now it is provided that they shall be recorded in a book kept for the purpose in the clerk's office of the county or corporation where the land lies.¹⁸

7. *Repository of Unrecorded Deeds, etc.*

It is provided that deeds and other transactions, *duly admitted to record*, but not yet *actually recorded* are to be kept in a safe repository by the clerk until such time as they can be re-

14. Va. Code, 1904, §§ 3559, 3559a, 3560, et seq.; ante, § 701.

15. Va. Code, 1904, §§ 2547, 2547a.

16. Va. Code, 1904, § 2476; ante, §§ 715, et seq., 718, et seq.

17. Va. Code, 1904, §§ 608, 611, 612, 645, 662; ante, §§ 1362, 1373, 1392.

18. Va. Code, 1904, § 2498b.
(1562)

corded, and an index is to be kept of them. Since deeds, etc., are void as to creditors and subsequent purchasers only until they are *admitted to record*¹⁹ (not until they are *actually recorded*), it is the part of wisdom for the examiner of a title to look into these transactions.²⁰

§ 1393. The Nature of Registry.

Exactly what constitutes registry in a given case is to be determined by an examination and interpretation of the particular statute.

In Virginia, in the case of deeds of conveyances, mortgages, deeds of trust and contracts to convey, sell, or lease real estate, registry, that is, the act whereby constructive notice of the transaction is given to creditors and subsequent purchasers, consists in *duly admitting the transaction to record*,—a phrase, the meaning of which is to be immediately explained;¹ in all other cases, “registry” is practically synonymous with the actual copying of the transaction into the respective record books.

In the first group of cases, the deed or contract is declared by the statute to be void as to creditors and subsequent purchasers for value and without notice except and until it be duly “*admitted to record*,” with a qualification (not applicable however to mortgages or deeds of trust) to the effect that if it be duly admitted to record within *ten days* after the *acknowledgment* thereof, such registry shall be as effectual as if it had been admitted to record on the day of such acknowledgment.²

There is perhaps some question as to the precise meaning of the phrase, “admitted to record,” occurring in the statute.³

Prior to the revisal of 1849, the language of the statute touching registry was more explicit than it is at present. It declared that the writings included in it should be “void as to all creditors

19. For the meaning of the term “admitted to record,” see post, § 1393.

20. Va. Code, 1904, § 2505.

1. Va. Code, 1904, §§ 2465, 2467.

2. Va. Code, 1904, §§ 2465, 2467.

3. Va. Code, 1904, § 2465.

and subsequent purchasers for valuable consideration without notice, unless they shall be acknowledged or proved, and *lodged with the clerk to be recorded*, according to the directions of this act; but the same as between the parties and their heirs, and as to all subsequent purchasers with notice thereof, or without valuable consideration, shall nevertheless be valid and binding.”⁴ Under this state of the law, it was held, unavoidably, that if the writing were *lodged with the clerk to be recorded*, it sufficed, whether it were actually recorded or not; and it was suggested that the recourse of a creditor or subsequent purchaser, injured by the nonregistry, was *against the clerk* for damages.⁵ It was never sufficient, however, merely to carry the writing *to the clerk's office*. It was always held to be requisite to *lodge it with the clerk to be recorded*.⁶

The present statute, in requiring that the deed or contract be “duly admitted to record,” seems to allow no effect to the mere lodging of the writing with the clerk to be recorded.⁷ And it is supposed that if any injury results to the *grantee* from the failure of the clerk immediately to *admit the deed to record*, such grantee may have against the clerk and his sureties the same redress which, prior to 1849, the creditor or subsequent purchaser would have had,⁸ or which, it would seem, they would yet have if, after admitting the deed to record, the clerk should fail actually to *record* it in the deed book, or should record it erroneously, whereby the parties mentioned might be misled as to the validity of the title.⁹

4. 2 Min. Insts. 959; 1 Rev. Code, 1819, p. 362, c. 99, §§ 4, 12.

5. 2 Min. Insts. 959; *Beverley v. Ellis*, 1 Rand. (Va.) 106.

6. 2 Min. Insts. 959; *Horsley v. Garth*, 2 Gratt. (Va.) 471, 44 Am. Dec. 393.

7. 2 Min. Insts. 959; *Johnston v. Nat. Exch. Bank*, 33 Gratt. (Va.) 480, 485. But see 2 Bart. Ch. Pr. 998, et seq.; *Shadrack v. Woolfolk*, 32 Gratt. 712; *Thomas v. Stuart*, 91 Va. 694, 22 S. E. 511, tending to show that it is enough to deposit the writing, duly certified, with the clerk.

8. 2 Min. Insts. 959; *Beverley v. Ellis*, 1 Rand. (Va.) 106; *Douglas v. Yallop*, 2 Burr. 722.

9. 2 Min. Insts. 959; *Davis v. Beazley*, 75 Va. 495; *Beverley v. (1564)*

The "admission to record" consists not only in bringing the deed or writing to the clerk, or lodging it with him to be recorded, but in the *indorsement* by the clerk upon the deed or writing, when delivered to him, of an order directing it to be recorded.¹⁰

Such admission of the deed or writing to record has the same effect as if the writing were actually spread *in extenso* upon the deed book.¹¹ And a clerk who has once duly admitted a deed or writing to record has no more power to recall his act or order of admission than he would have to strike from the deed book a deed duly copied therein. Hence, if after a deed has been admitted to record the clerk, upon the request of another, undertakes to hold back the registry thereof until further ordered, or to alter the day of such admission to record to a subsequent date, it does not affect the admission to record first made.¹²

The admission of a deed or writing to record, like the recordation itself, is merely a *ministerial* act, which the clerk or court *cannot lawfully refuse* to perform, if the writing be properly authenticated for registry, and which may be compelled by a writ of *mandamus*;¹³ and consequently, since a *mandamus* lies only where there is *no other remedy*, no process of *appeal* to a higher court is permissible from the order declining to admit the writing to record.¹⁴ It moreover follows, or is said to follow, from this proposition that if the clerk who admits the deed to record is a trustee therein, or has acted as counsel in preparing it, the admission to record is nevertheless valid, since it is not a *judicial* act.¹⁵

Ellis, 1 Rand. (Va.) 106; Douglas v. Yallop, 2 Burr. 722. See Thomas v. Stuart, 91 Va. 694, 22 S. E. 511.

10. 2 Min. Insts. 959; Davis v. Beazley, 75 Va. 495; Mercantile, etc., Bank v. Brown, 96 Va. 614, 32 S. E. 64.

11. 2 Min. Insts. 959; Davis v. Beazley, 75 Va. 495; Mercantile, etc., Bank v. Brown, 96 Va. 614, 32 S. E. 64.

12. Mercantile, etc., Bank v. Brown, 96 Va. 614, 32 S. E. 64.

13. 2 Min. Insts. 960; Dawson v. Thurston, 2 Hen. & M. (Va.) 132; Manns v. Givens, 7 Leigh (Va.) 705, et seq.; Paul v. Baugh, 85 Va. 961, 9 S. E. 329; Corey v. Moore, 86 Va. 721, 11 S. E. 114.

14. 2 Min. Insts. 960.

15. Paul v. Baugh, 85 Va. 961, 9 S. E. 329. But since the *taking*
(1565)

The certificate of the clerk of the court of registry, written on the conveyance, that it has been acknowledged or proved, and admitted to record, is evidence of the fact;¹⁶ and being *itself a record*, is, in the absence of proof of *fraud*, conclusive of the *facts of acknowledgment and registry*;¹⁷ of the *place* of acknowledgment, that is, the *clerk's office*, where alone the clerk or his deputy can receive acknowledgments;¹⁸ and by parity of reason, it would seem, of the *time* of acknowledgment.¹⁹

In the case of the recordation of the liens of *attachment* and *lis pendens*, the statutory requirement is that the proper memorandum "shall be left with the clerk," who shall forthwith record the same in the deed book and index the same.²⁰ There seems to be doubt whether the recordation under this statute is to date from the time such memorandum is *left with the clerk* or from the time he *records* it, or from the time he *indexes* it.

§ 1394. Modes of Authenticating Instruments for Registry.

The registry of instruments of title being of such importance to the community generally, public policy requires that their

of an acknowledgment is, it is said, a *judicial* act, the clerk under similar circumstances could not properly take the acknowledgment of the grantor in the deed. *Davis v. Beazley*, 75 Va. 491; *Paul v. Baugh*, 85 Va. 961, 9 S. E. 329. See 2 Min. Insts. 957, 958. But as to deeds of trust wherein the clerk is made trustee, executed prior to 1904, it is enacted that if the acknowledgment thereto shall have been taken by such clerk, it shall be held valid and effective in all respects, if otherwise valid according to the law then in force. Va. Code, 1904, § 2501d. This statute leaves undetermined, as to deeds made *after its passage*, the validity of such an acknowledgment; presumably it is ineffectual.

16. 2 Min. Insts. 962; *Kinnersley v. Orpe*, 1 Dougl. 57; *Beverley v. Ellis*, 1 Rand. (Va.) 106; *Davis v. Sims*, 1 Va. Dec. 390.

17. 2 Min. Insts. 963; *Harkins v. Forsyth*, 11 Leigh (Va.) 294.

18. 2 Min. Insts. 963; Va. Code, 1904, § 2500; *Carper v. McDowell*, 5 Gratt. (Va.) 212.

19. 2 Min. Insts. 963. But see *Horsley v. Garth*, 2 Gratt. (Va.) 471, 44 Am. Dec. 393.

20. Va. Code, 1904, § 3566.
(1566)

genuineness should be properly established before they are recorded.¹

If the instrument to be recorded already constitutes a part of the *court records*, as in the case of a judgment, an authenticated abstract thereof, duly certified by the clerk of the court whose record it is, whether state or federal, is a sufficient guaranty of its genuineness, and upon the presentation of such an abstract, it will be recorded in the judgment docket in the clerk's office of any court in the commonwealth.²

But in the case of other instruments such as deeds of conveyance, mortgages, deeds of trust, contracts to convey, etc., whose genuineness does not appear upon their face, it is required that they shall be authenticated for registry, in general either by the *evidence of witnesses* or by the *acknowledgment* of the party whose act, declaration or contract is to be recorded, duly made before and certified by the officers designated by the law for the purpose, that such act, declaration, etc., is his act.³ These modes of authentication will be considered more fully in the following sections.

§ 1395. I. Proof by Two Witnesses.

The Virginia statutes require, if the authentication be by witnesses and not by acknowledgment, that there shall be *two witnesses*, whether such proof be made inside or outside the state of Virginia or the United States.¹ The simplest case would be where the two witnesses appear before the court in whose clerk's office the instrument is to be recorded, or before the clerk thereof, or his deputy *in his office*.² But the proof may be made by the

1. 2 Min. Insts. 953; *Baker v. Preston*, Gilm. (Va.) 235; *Lee v. Tay-scott*, 2 Wash. (Va.) 276; *Pollard v. Lively*, 2 Gratt. (Va.) 218; *Johnston v. Slater*, 11 Gratt. 324.

2. Va. Code, 1904, §§ 3559, et seq.

3. Va. Code, 1904, § 2500, et seq. In some cases the *affidavit* of the party presenting the matter for recordation is made sufficient, as in case of mechanics' liens. Va. Code, 1904, § 2476.

1. Va. Code, 1904, §§ 2500, 2501.

2. Va. Code, 1904, § 2500.

witnesses before the *clerk of any court of record*, in Virginia or in any other state of the Union, and when a *certificate* of such clerk that proof has been so made is presented to the clerk of the court of registry or to the court itself, the writing shall thereupon be admitted to record.³ The same principle is extended to the certificates, under their official seals, of the various diplomatic or consular agents of the United States abroad, or of the proper officer of any court of a foreign country, or of the mayor or chief magistrate of any city or town therein, that the writing has been proved before him by two witnesses.⁴

It is not requisite, as it is in the case of wills, though sometimes advisable, that the witnesses shall be *subscribing* or *attesting* witnesses.⁵ Nor, if they have subscribed as witnesses, need they remember the transaction in order to constitute sufficient *formal proof*. It is enough for that formal purpose that they can testify that they recognize their own signatures; and their testimony becomes decidedly more satisfactory if they depose that they were acquainted with the requisites of the proper execution of a writing, and would not have attested it had those requisites been wanting.⁶

§ 1396. II. Authentication by Acknowledgment—Discussion Outlined.

We shall examine this topic briefly under the following heads:

(1) The officials authorized to take acknowledgments; (2) Effect of a party to the instrument taking the acknowledgment; (3) The form of the certificate of acknowledgment; (4) The effect of acknowledgment.

3. Va. Code, 1904, § 2501.

4. Va. Code, 1904, § 2501. The statute designates the officers who may make such certificates.

5. Ante, § 1145; 2 Min. Insts. 953; *Turner v. Stip*, 1 Wash. (Va.) 322; *Long v. Ramsey*, 1 Serg. & R. (Penn.) 72.

6. 2 Min. Insts. 953; *Currie v. Donald*, 2 Wash. (Va.) 58; *Clarke v. Dunnavant*, 10 Leigh (Va.) 13. The witnesses must be *competent*. 2 Min. Insts. 953; *Johnston v. Slater*, 11 Gratt. (Va.) 321. (1568)

§ 1397. Same—Officials Authorized to Take Acknowledgments.

Since the whole matter of registry and the authentication for the same is statutory and in derogation of the common law, the statutes governing the subject are to be followed, *substantially* at least, in all material points. Hence it is properly held that the acknowledgment of a deed must be made before the officers, and according to the form, prescribed by law. No material defect in form or substance can be supplied by parol or substituted by other ceremonies or other officials, though they may seem to the parties concerned equally good or appropriate. But only a *substantial compliance* is necessary.¹

In view of these principles, great pains should be taken to see that the acknowledgment is made before an official authorized by law to take it, and that the certificate of such official sets forth all that the statute requires shall be recited therein; it is the wisest course in all cases to follow precisely the statutory form of certificate, if there be one. The failure to comply substantially with the statute in any of these particulars, renders *void* the admission of the instrument to record and lays the property affected thereby open to the claims of creditors and subsequent purchasers for value and without notice.²

The Virginia statutes provide that such acknowledgment may be taken (1) *in the court* in whose office the writing is to be recorded; or (2) before the *clerk* thereof, or his duly qualified *deputy, in his office*;³ or (3) before the *clerk* of any court of record in any state of the Union; or (4) before the proper officer of any court of a foreign country with which the United States has diplomatic or consular relations; or (5) before a notary pub-

1. Hurst v. Leckie, 97 Va. 551, 5 Va. Law Reg. 594, note, 630, 75 Am. St. Rep. 798; Geil v. Geil, 101 Va. 773, 45 S. E. 325. See 4 Va. Law Reg. 342.

2. Hurst v. Leckie, 97 Va. 551, 5 Va. Law Reg. 594, note, 630, 75 Am. St. Rep. 798; Geil v. Geil, 101 Va. 773, 45 S. E. 325. See Sullivan v. Gum, 106 Va. 245, 55 S. E. 535.

3. Va. Code, 1904, § 2500; Gate City v. Richmond, 97 Va. 337, 33 S. E. 615.

lic, a justice or a commissioner in chancery of a court of record, within the United States or its territorial dependencies; or (6) before a "commissioner of deeds" within the United States, appointed by the Governor of Virginia; or (7) before any United States ambassador, minister, chargé d' affaires, consul general, consul, vice consul or commercial agent, accredited to a foreign country.⁴

The *official character* of the functionary before whom the acknowledgment may take place, as well as the *fact* of such acknowledgment and the *place* (and probably the *time*) of the acknowledgment, is sufficiently proved by the *certificate* of the officials themselves and the recitals therein, save that if the acknowledgment be taken *outside of the United States*, it must be under the *official seal* of the functionary taking it.⁵

While the statute requires that the official should take the acknowledgment in the particular county or corporation wherein his authority is recognized, and that the party should *personally appear* before such functionary in order to make the acknowledgment, it is not necessary that either the functionary himself or the party making the acknowledgment should *reside*, or appear to reside, within the limits of the district to which the authority certifying the acknowledgment belongs.⁶

4. Va. Code, 1904, §§ 2501, 924.

5. 2 Min. Insts. 955; Va. Code, 1904, § 2501; Willink v. Miles, 1 Pet. (U. S. C. C.) 424, et seq.; Rhodes v. Selim, 4 Wash. (U. S. C. C.) 715; Cales v. Miller, 8 Gratt. (Va.) 12, 13; Welles v. Cole, 6 Gratt. 660; Hurst v. Leckie, 97 Va. 562, 34 S. E. 564, 75 Am. St. Rep. 798; Sullivan v. Gum, 106 Va. 245, 55 S. E. 535. In Welles v. Cole, *supra*, it was held that, although the certificate describe the officers taking the acknowledgment, not as *justices of the peace*, but as *aldermen in a city*, in another state, yet as aldermen with us, and generally in the United States, *act as justices*, it is to be presumed, in the absence of any contrary proof, that they are justices, especially as they undertake to authenticate deeds under our statute, which requires them to be such; and the authentication is sufficient. 2 Min. Insts. 956. See Acts, 1908, p. 126.

6. 2 Min. Insts. 956; Va. Code, 1904, § 2501; Cales v. Miller, 8 Gratt. (Va.) 12, 13; Hassler v. King, 9 Gratt. 119.
(1570)

§ 1398. Same—Effect of Acknowledgment Taken by a Party to the Writing.

Neither the clerk of the court nor any other officer authorized to certify acknowledgments of writings for registry is competent to take and certify *his own acknowledgment* of a deed wherein he is *grantor*,¹ nor, independently of statute, can he take the acknowledgment of another to a writing wherein he is *beneficiary* or *grantee*.² But there are now several statutes in Virginia, the effect of which is to *cure* such defects in previous acknowledgments, where the interest of the officer in the writing acknowledged is merely formal or very slight.³

This principle is based upon sound sense and policy, and is usually, though perhaps questionably,⁴ placed upon the ground that the function of taking and certifying acknowledgments is *judicial*, or “partakes of a judicial character,” and that no person can ever be *judge in his own case*.⁵

It follows from the *judicial* character of the act of taking an acknowledgment that it cannot be *impeached collaterally*. The

1. 2 Min. Insts. 957; *Davis v. Beazley*, 75 Va. 491; *Leftwich v. Richmond*, 100 Va. 164, 40 S. E. 651.

2. 2 Min. Insts. 957; *Clinch River Veneer Co. v. Karth*, 90 Va. 737, 19 S. E. 878; *Nicholson v. Gloucester Charity School*, 93 Va. 101, 104, 24 S. E. 899; *Iron Belt Building Association v. Groves*, 96 Va. 139, 31 S. E. 23; *Hunton v. Wood*, 101 Va. 58, 43 S. E. 186; *Davis v. Beazley*, 75 Va. 491; *Raines v. Walker*, 77 Va. 92; *Bowden v. Parrish*, 86 Va. 67, 9 S. E. 616, 19 Am. St. Rep. 873; *Corey v. Moore*, 86 Va. 721, 11 S. E. 117; *Barton v. Brent*, 87 Va. 385, 13 S. E. 29.

3. See Va. Code, 1904, § 2501b, as to a *stockholder* taking the acknowledgment of his company; § 2501c, where the *justice or notary* taking the acknowledgment is trustee in the deed acknowledged; § 2501d, where the *clerk* taking the acknowledgment is a trustee; as to a mayor or alderman of a city or town taking acknowledgment, Acts, 1908, p. 126.

4. See 2 Min. Insts. 957, 958.

5. 2 Min. Insts. 957; *Davis v. Beazley*, 75 Va. 495; *Bowers v. Bowers*, 29 Gratt. (Va.) 700, et seq.; *Bowden v. Parrish*, 86 Va. 68, 9 S. E. 616, 19 Am. St. Rep. 873; *Corey v. Moore*, 86 Va. 733, 11 S. E. 117; *Paul v. Baugh*, 85 Va. 961, 9 S. E. 329; *Iron Belt Building Association v. Groves*, 96 Va. 139, 140, 31 S. E. 23.

officer, in taking the acknowledgment, determines whether the person whose name is signed to the writing is the actual grantor, and whether he truly acknowledges it as his act or deed, and the officer's certificate of his determination of these points in conformity to law, the writing being thereupon admitted to record, has the conclusive effect of a judgment, importing absolute verity. It cannot therefore be impeached, even *directly*, save in a court of *equity*, and not there except for *fraud*.⁶

§ 1399. Same—Form of Certificate of Acknowledgment.

If the *form* of the certificate of acknowledgment is given by the statute itself, as is the case in Virginia, the wisest course is to use the identical language of the statute. But a certificate which departs from the language of the statute is not invalid for that reason merely, if it contains substantially all that the statute requires shall be inserted therein.¹

The student is specially referred to the statutory forms given in the note below.²

It will be remembered that formerly the certificate of acknowledgment of a *married woman* was required to contain a

6. *Carper v. McDowell*, 5 Gratt. (Va.) 212, 230, 235; *First Nat. Bank v. Paul*, 75 Va. 594, 40 Am. Rep. 740; *Murrell v. Diggs*, 84 Va. 900, 6 S. E. 461, 10 Am. St. Rep. 893; *Iron Belt Building Association v. Groves*, 96 Va. 140, 31 S. E. 23.

1. *Hurst v. Leckie*, 97 Va. 551, 34 S. E. 564, 75 Am. St. Rep. 798, 5 Va. Law Reg. 594, note, 630.

2. Some of the more frequently recurring forms of certificate of acknowledgment prescribed by the Virginia statute are here appended in order to familiarize the student with the phraseology.

1. State of Virginia, County of Albemarle, to-wit:

I, —, Clerk (or deputy clerk) of the circuit court for the county aforesaid in the state of Virginia, do certify that E. F., whose name is signed to the writing above (or hereto annexed), bearing date on the — day of —, has acknowledged the same before me [in my office] in the county aforesaid. Given under my hand this — day of —.

(Signed) A. B., Clerk [or Deputy Clerk].

[The words "in my office" are not required by the statute, but the *act* of acknowledgment before the clerk or his deputy is required to (1572)]

statement that she had personally appeared before the certifying officer, that she had been examined by him privily and apart from her husband, and that when thus examined she had acknowledged that the writing was her act, that she had willingly executed it, and did not wish to retract it.³ But since 1887, a married woman, as to the acknowledgment of writings, has been placed upon the same footing as other persons.⁴

§ 1400. Same—Effect of Acknowledgment.

The principal effect of acknowledgment is that it is the statutory method of assuring the genuineness of the instrument acknowledged for purposes of *registry*, and no other proof thereof is necessary, nor indeed possible, unless it be prescribed by the statutes.¹

Whether it has the subordinate and incidental effect of establishing the genuineness of the deed, even though it be not admitted to record, so as to dispense with further proof thereof when the deed is introduced as evidence in an action of ejectment,

take place there, and it is perhaps safer to state it in the certificate. Va. Code, 1904, § 2501. See *Carper v. McDowell*, 5 Gratt. (Va.) 212; *Sullivan v. Gum*, 106 Va. 245, 55 S. E. 535.]

2. State of Maryland, County of Frederick, to-wit:

I, —, a notary public for the county aforesaid, in the state of Maryland, do certify that E. F. and S. F., his wife, whose names are signed to the writing above (or hereto annexed), bearing date on the — day of —, have acknowledged the same before me in my county aforesaid. Given under my hand this — day of —.

(Signed) A. B., N. P.

[My commission expires on the — day of —.]

[The omission of this last phrase does not seem to invalidate the certificate of acknowledgment, but subjects the notary to a *fine*. Va. Code, 1904, § 2501e.]

Other forms of certificates by other officers may be found in Va. Code, 1904, § 2501.

3. Ante, § 309; 2 Min. Insts. 932; Va. Code (1873) ch. 117, §§ 4, et seq.

4. Ante, § 311; Va. Code, 1904, § 2502.

1. Va. Code, 1904, §§ 2500, 2501; *First Nat. Bank v. Paul*, 75 Va. 601, 40 Am. Rep. 740.

(1573)

is a doubtful question in Virginia. The weight of reason, however, if not of authority, would seem to be in favor of its being received as evidence,—at least, to the extent of shifting the burden of proof.²

However this may be, it is provided in Virginia by statute that *deeds or powers of attorney*, executed *outside of Virginia*, if they have been acknowledged or proved so as to be capable of being admitted to record, shall be evidence in any court in Virginia. This applies to the original, not to copies.³

§ 1401. Effect of Registry as between the Parties.

The *validity* of the conveyance *as to the parties thereto* and their heirs, and *as to volunteers* claiming under them as devisees, or as purchasers without valuable consideration, and also as to purchasers for valuable consideration but *with notice*, depends in no degree upon the circumstance of registry, whose design is to acquaint persons concerned with the existence of the transaction, which cannot fail to be known, of course, to the parties thereto. The statute, accordingly, makes an unregistered writing void only as to *creditors* and subsequent *purchasers* for value and without notice.¹

The only exceptions to this principle seem to be found in the case of (1) a *married woman's* conveyance of, or contract to convey, her *equitable* separate estate, which the statute declares shall, when it has been *duly admitted to record* as to both husband and wife operate to convey such right as the wife may

2. 2 Min. Insts. 960, 961; Hassler v. King, 9 Gratt. (Va.) 115. But see *contra*, Kidd v. Alexander, 1 Rand. (Va.) 456. See Petermans v. Laws, 6 Leigh (Va.) 523.

3. Va. Code, 1904, § 3344. See Petermans v. Laws, 6 Leigh (Va.) 523.

1. 2 Min. Insts. 963; Va. Code, 1904, § 2465; 2 Lom. Dig. 484; Turner v. Stip, 1 Wash. (Va.) 319; Currie v. Donald, 2 Wash. 63; Dabney v. Kennedy, 7 Gratt. (Va.) 327; McCandlish v. Keen, 13 Gratt. 632; Hunton v. Wood, 101 Va. 54, 43 S. E. 186; Gatewood v. Goode, 23 Gratt. 880, 890; Rhea v. Preston, 75 Va. 757, 767, 768.
(1574)

have;² and (2) a *tax deed* to land sold for delinquent taxes.³

But aside from its effect upon the *validity* of the writing as between the parties, the due registry thereof has a very important effect by way of *evidence*. For if a deed be *duly registered* an *office copy*, certified by the clerk of the court where it is registered, is *primary evidence* of its contents, without accounting for the original.⁴

On the other hand, a writing which is *improperly recorded* (either because it is not properly authenticated, or because it is recorded in the wrong county or corporation) is not regarded as a *recorded deed*,⁵ and hence a *copy*, though duly certified, is not competent evidence,⁶ except where both parties claim under a *common deed* or source of title or under an instrument which *refers* to the writing thus irregularly recorded.⁷

Thus, in *Turner v. Stip*,⁸ the *original deed*, which had been executed in 1785, in South Carolina, was offered in evidence in an action of ejectment for the land in controversy, and in proof of its genuineness, the plaintiff offered the certificate of two per-

2. Va. Code, 1904, § 2502; ante, § 311. See *Tarrant v. Core*, 106 Va. 161, 56 S. E. 228; *Thomas v. Stuart*, 91 Va. 694, 22 S. E. 511.

3. Va. Code, 1904, § 661; ante, § 1384.

4. 2 Min. Insts. 960; Va. Code, 1904, § 3334; *Baker v. Preston*, Gilm. (Va.) 235; *Lee v. Tapscott*, 2 Wash. (Va.) 276; *Pollard v. Lively*, 2 Gratt. (Va.) 218; *Johnston v. Slater*, 11 Gratt. 324.

5. 2 Min. Insts. 960; *Turner v. Stip*, 1 Wash. (Va.) 319; *Barley v. Byrd*, 95 Va. 316, 28 S. E. 329.

6. 2 Min. Insts. 960; *Pollard v. Lively*, 2 Gratt. (Va.) 216; *Carter v. Robinett*, 33 Gratt. 432, 440; *Barley v. Byrd*, 95 Va. 316, 28 S. E. 329.

7. 2 Min. Insts. 960; *Hannon v. Hannah*, 9 Gratt. (Va.) 146; *French v. Townes*, 10 Gratt. 513; *Fiott v. Com.*, 12 Gratt. 577. This is in accord with the general principle of evidence in ejectment suits, that where the plaintiff and defendant in ejectment claim the land in controversy under a common grantor or from a common source, it is unnecessary for either to trace his title beyond such source. *Marbach v. Holmes*, 105 Va. 178, 52 S. E. 828; *Carter v. Wood*, 103 Va. 68, 48 S. E. 553; *Chesterman v. Bolling*, 102 Va. 471, 46 S. E. 470; *Bolling v. Teel*, 76 Va. 493.

8. 1 Wash. (Va.) 319, 323.

sons who *styled themselves* justices of the peace for the district of Camden, in South Carolina, stating that three witnesses swore before them to the execution of the deed by the parties thereto, upon which certificate the deed had been admitted to record in the county court of Berkeley county, where the land lay. As the law then was, the official character of the justices was required to be attested by the certificate of the *governor of the state* where they belonged, and as such certificate was wanting here, it was held that the conveyance had been *illegally recorded*, and, therefore, its authenticity was not adequately established *for any purpose*, by the proof in question, neither for the purpose of admitting it to record, nor for the purpose of evidence to the jury.⁹

So in *Pollard v. Lively*,¹⁰ a writ of right had been instituted in the circuit court of Monroe county, by Benjamin Pollard's heirs against one Lively, to recover a tract of 200 acres of land; and in the progress of the trial, the *tenant* (that is the *defendant*, Lively), offered in evidence, *office copies* of two deeds, admitted to record in the *borough court of Norfolk*, whereby Benjamin Pollard purported to convey certain lands lying *in the county of Greenbrier*. It was determined that the hustings court of Norfolk had no authority to admit the deeds to record, nor consequently (as the law then was), to receive proof for that purpose, and that the acknowledgment or proof and the admission to record and the registry of the instruments being all unwarranted by the law, the certificate of the clerk, the public custodian of the record, was entitled to no more respect than that of a private man.¹¹

In respect to the *qualification* of the doctrine, namely, that where both parties claim *under the same deed*, or under an instrument which *refers to a deed*, not duly recorded, it is not

9. 2 Min. Insts. 960. It is worthy of observation, however, that an *original deed duly authenticated* for registry is itself, according to the better view, admissible as *original evidence*, without further proof of its execution, though it has not been duly recorded. Ante, § 1400, note 2.

10. 2 Gratt. (Va.) 216, 218.

11. 2 Min. Insts. 961.

competent to either to object to the illegal registry; we find ample illustration thereof in the Virginia decisions.

Thus, in *Hannon v. Hannah*,¹² Austin had, in 1814, conveyed lands lying in *Kanawha county*, to Shepherd, of Henrico, and the conveyance was recorded in *Hanover*, where Austin lived, and *not in Kanawha*. Afterwards Shepherd conveyed two-thirds of the lands to Wilson and Winn, respectively, and the deed to them, which recited the conveyance from Austin to Shepherd as being *registered in Hanover*, was duly recorded in *Kanawha*. Subsequently Wilson conveyed *his third* of the tract to Prior, and in the deed referred to the conveyance under which he claimed from Shepherd to himself, as recorded in *Kanawha*, and Prior conveyed parts of the same land, with similar references, to Hannon and to Brown. Winn likewise conveyed *his third* to Hannah, citing the conveyance from Shepherd to Wilson and himself, as of record in *Kanawha*. The owners of the tract, therefore, were Shepherd's heirs of one-third undivided, Prior's heirs and alienees of one-third part undivided, and Hannah of one-third part undivided. The suit was a bill in equity filed by Hannah for a *partition* against Shepherd's heirs and Prior's heirs and alienees. Hannah sought to prove his title by an *office copy* from *Hanover county court* of the deed from Austin to Shepherd, to which Prior's heirs and alienees, though claiming *under the same deed*, objected, because that deed was *improperly recorded* in *Hanover*. The court held, however, that, as the deed was the *common source* of title of all parties, and was referred to directly or *mediately* in all the conveyances to them respectively, as well by its *place of record* as its date, it was not competent to any of the defendants to object, either to the validity of that deed for want of registry, or to an office copy thereof as evidence.¹³

In *Fiott v. Com.*,¹⁴ the same doctrine is reiterated. *Fiott*, a

12. 9 Gratt. (Va.) 146.

13. 2 Min. Insts. 961, 962. See also, *French v. Townes*, 10 Gratt. (Va.) 513, 514, 524.

14. 12 Gratt. (Va.) 564, 577, 578.

British subject and resident, in 1793, bought of Vancouver land lying in the *county of Cabell*, and the conveyance was recorded in 1794, in the *county of Kanawha*. Fiott having died in 1818, leaving two children his heirs, the escheator of the county of Cabell, in 1831, set on foot proceedings to escheat the land to the Commonwealth. The escheator's jury found that Fiott died in 1818, that he was an alien at the time of his death; and that then, and long before, he was seised of the land in question, which had been conveyed to him by Vancouver, "as by deed dated 27th July, 1793, now of record in the county court of Kanawha county, will more fully appear." In 1833, Fiott's heirs filed their *monstrans de droit* in the circuit court of Cabell county, setting out their father's title, that they were his heirs, and that the title to the land was preserved to him and them, notwithstanding their alienage, by Article IX. of the treaty with Great Britain of 1794, commonly called Jay's treaty, to which the attorney for the commonwealth replied generally, and the issue was joined thereon. At the trial, the plaintiffs, after endeavoring in vain to introduce the original deed from Vancouver to their father, which was rejected because insufficiently proved, proposed to read an *office copy* of the deed from the *records of Kanawha*. The court held that, whether the deed were properly recorded or not, the office copy was admissible, because the inquisition, which was the basis of the commonwealth's title, referred to it, and both parties to the controversy claimed under it.¹⁵

§ 1402. Effect of Registry as to Third Persons.

The only persons in general as to whom the registry laws avoid unregistered writings are (1) *creditors*, and (2) *subsequent purchasers for value and without notice*.¹

But though a deed or writing conform in all respects to the

15. 2 Min. Insts. 962.

1. Va. Code, 1904, §§ 2460, 2463, et seq., 3566, 3570, etc. Registry is not notice to "all the world," as is frequently stated. See 6 Va. Law Reg. 58.

(1578)

registry laws, it may yet be void as to creditors and purchasers, if the property mentioned therein is so vaguely or inaccurately described as to mislead third persons or render it impracticable for them to identify the property affected thereby,²—and that, even though the description be sufficient to transfer a title valid as between the parties, as where it is in such general terms as “all my real estate.”³

§ 1403. Same—Index to Records as Notice to Third Parties.

The Virginia registry laws provide in almost every instance not only for the recordation of deeds, contracts to convey and liens upon lands, but also that, when recorded, they shall be *indexed* in the names of the respective parties interested.¹

But though the purpose of this index is to save the examiner of the title the necessity of going over the record books page by page,—an enormous task,—this*beneficent purpose is frustrated by the interpretation placed by the courts upon the statutory provision,—at least, in the case of deeds and contracts to convey,—it being held that the actual proper registry of a deed or other writing, even though not indexed or indexed in the wrong name, is still notice to third parties on the ground that while the index is the *key* to the record books, it is not essential to due admission to record.² The result of this interpretation is to render the *index* to the deed books an untrustworthy guide in the examination of a title, and makes it necessary, if one would be perfectly safe, to examine the deed books themselves, page by page.

2. Mundy v. Vawter, 3 Gratt. (Va.) 545; Florance v. Morien, 98 Va. 26, 34 S. E. 890, 5 Va. Law Reg. 757; Merritt v. Bunting, 107 Va. 178, 179, 57 S. E. 567.

3. Mundy v. Vawter, 3 Gratt. (Va.) 545; Florance v. Morien, 98 Va. 26, 34 S. E. 890, 5 Va. Law Reg. 757; State Savings Bank v. Stewart, 93 Va. 447, 25 S. E. 543; Clark v. Hutzler, 96 Va. 73, 30 S. E. 469; Patch v. White, 117 U. S. 210; post, § 1408.

1. Va. Code, 1904, §§ 2505, 3561, 3566.

2. Va. Bldg. & Loan Co. v. Glenn, 99 Va. 460, 39 S. E. 136, 7 Va. Law Reg. 314; Old Dominion Granite Co. v. Clarke, 28 Gratt. (Va.) 617.

But in the case of *judgments*, the statute itself reverses this rule, declaring that a judgment "shall not be regarded as *docketed* as to any defendant in whose name it is not so indexed."³

In the case of *attachments*, and *lis pendens*, the rule seems to be as yet undetermined.⁴

§ 1404. Same—I. Who Are the "Creditors" Protected by the Registry Laws.

The *creditors*, the protection of whom is contemplated by the registry laws, comprise very much the same classes of persons as are embraced in the same words in the statute of *Fraudulent Conveyances*.¹

It will be remembered that the term, as used in the latter statute, includes not only all persons who claim *ex contractu*, as by reason of collateral agreement as well as by reason of a debt properly so called, but also persons who sue *ex delicto* for tort, as for adultery, seduction, slander, assault and battery, etc.² And the statute of *Fraudulent Conveyances* itself declares that the term "creditors" shall not be restricted to the creditors of the *grantor*, as formerly,³ but shall extend to and embrace all creditors who, but for the deed or writing, would have a right to *subject the property conveyed* to their debts,⁴ it being immaterial

3. Va. Code, 1904, § 3561; *Bankers L. & I. Co. v. Blair*, 99 Va. 606, 86 Am. St. Rep. 914, 39 S. E. 231; *Fulkerson v. Taylor*, 100 Va. 426, 41 S. E. 863. Thus, the docketing and indexing of a judgment in the name of "Mrs. John Smith" is no notice to purchasers of a judgment against "Mary Smith," though she be in fact the wife of John Smith. *Bankers L. & I. Co. v. Blair*, *supra*.

4. Ante, § 1393, note 20; Va. Code, 1904, § 3566.

1. Va. Code, 1904, § 2472; ante, § 1171.

2. 2 Min. Insts. 963, 690; ante, § 1171; *Johnson v. Wagner*, 76 Va. 587.

3. 2 Min. Insts. 964, 965; ante, § 1171; *Prior v. Kinney*, 6 Munf. (Va.) 510, 514.

4. Va. Code, 1904, § 2472; ante, § 1171; 2 Min. Insts. 964, 965; *Thomas v. Gaines*, 1 Gratt. (Va.) 355; *Dabney v. Kennedy*, 7 Gratt. 317.

(1580)

whether such debts were contracted *before* or *after* such deed.⁵

But there is one point as to which the statute of Fraudulent Conveyances differs from the registry acts with respect to creditors. In the case of *fraudulent conveyances*, the former rule requiring that a creditor must be a *lien* creditor,—that is, must have obtained a lien by judgment, attachment, mechanic's lien, etc., by virtue of which he would have the right to charge the debtor's land *specifically* in equity,⁶—has been altered by statute providing that a creditor *at large* may, *before obtaining a judgment or decree*, whether his claim be due and payable or not, institute any suit which he might institute afterwards to avoid the *fraudulent conveyance*.⁷

But this last mentioned statute applies in terms only to *fraudulent* conveyances, and hence the old rule applies with full force to deeds or writings which are *not fraudulent* but merely *unregistered*, namely, that the creditor must have secured a *lien* by judgment, attachment, etc., before he may claim the unregistered writing to be *void* as to him.⁸ It must be remembered, however, that a creditor who is secured by a *deed of trust* or a *mortgage* is regarded no longer as a *creditor*, but as a *purchaser for valuable consideration*,⁹ so that he must be considered under the head of *purchasers*.¹⁰

As to *creditors*, it is immaterial in Virginia whether or not they have *notice* of the unregistered writing at the time the debt is contracted or the lien secured. The statute declares the writing void as to *all creditors*, without discriminating in respect of

5. Price *v.* Wall, 97 Va. 334, 75 Am. St. Rep. 788, 33 S. E. 599.

6. Ante, § 1171; 2 Min. Insts. 963.

7. Va. Code, 1904, § 2460; ante, § 1171.

8. 2 Min. Insts. 963; 2 Lom. Dig. 486; Tate *v.* Liggatt, 2 Leigh (Va.) 99, et seq.; Kelso *v.* Blackburn, 3 Leigh, 299, 309, 312; McCandlish *v.* Keen, 13 Gratt. (Va.) 630; Dulany *v.* Willis, 95 Va. 606, 64 Am. St. Rep. 815, 29 S. E. 324.

9. Ante, § 595; Rhea *v.* Preston, 75 Va. 757, 768; Hill *v.* Rixey, 26 Gratt. (Va.) 72, 80; Exchange Bank *v.* Knox, 19 Gratt. 739; Wickham *v.* Lewis, Martin & Co., 13 Gratt. 427.

10. Post, §§ 1406, et seq.

notice, as it does in the clause touching *purchasers*.¹¹ Nor is it necessary that they be *subsequent* creditors, it being immaterial whether the creditors have contracted their debts or secured their liens before or after the registry of the writing. The word "subsequent" used in the statute applies to *purchasers* only.¹²

It is a necessary part of the protection thus afforded to *creditors*, that a purchaser at a sale made for the creditor's benefit, in pursuance of the statute, is also to be protected, for else the creditor would derive no advantage, or at least an imperfect advantage, from his privileged position.¹³ It should be noted, also, that where a creditor who has a right to charge land as against an unrecorded deed is paid by a *surety*, the latter is *subrogated* to his rights, and may enforce all his remedies.¹⁴

And if, upon an *exchange* of lands, where *mutual conveyances* are made, the grantee of one tract fails to record his deed, a judgment against his grantor binds *both tracts*,—that given as well as that received in exchange.¹⁵

Finally, it is a long established rule of the courts of equity that (apart from any positive provision of a *statute* to the contrary), where one has acquired an *equitable interest* in land, with a good right to call for the conveyance of the legal title, and

11. 2 Min. Insts. 964; *Guerrant v. Anderson*, 4 Rand. (Va.) 211; *Eidson v. Huff*, 29 Gratt. (Va.) 342. See *Basset v. Nosworthy*, 2 White & Tud. Lead. Cas. Eq. 110, et seq. An important qualification of this doctrine is to be noted however in the case of conflicting claims of mechanics filed against a building erected by an owner holding under an unregistered deed and of judgment creditors of the owner's grantor. Following the registry statute, the unrecorded deed is *void* as to creditors of the grantor, and the judgment creditor should take priority over any lien imposed upon the land in the hands of the grantee, but it has been held that the mechanic's lien would take the priority. *Pace v. Moorman*, 99 Va. 248, 37 S. E. 911, 6 Va. Law Reg. 829, note. There was strong dissent in the case, however, and perhaps the point may not be regarded as definitely settled.

12. Va. Code, 1904, § 2465; *Price v. Wall*, 97 Va. 334, 75 Am. St. Rep. 788, 33 S. E. 599.

13. 2 Min. Insts. 964; *Guerrant v. Anderson*, 4 Rand. (Va.) 211.

14. *Eidson v. Huff*, 29 Gratt. (Va.) 342; 2 Min. Insts. 964.

15. *Price v. Wall*, 97 Va. 334, 75 Am. St. Rep. 788, 33 S. E. 599. (1582)

a subsequent lien creditor (*e. g.*, a *judgment creditor*) of the assignor whose debt did not originally affect the land, acquires a lien thereon, he shall notwithstanding be postponed to the equitable claimant. For since the subsequent lien creditor did not *originally* take the land for his security, nor had in his view an intention to affect it when afterwards the land is affected by his lien, and he comes in claiming *under the very person* that is obliged in conscience to make the assurance good, he stands in that person's place, and is postponed, despite his want of notice, to the *superior equity* of the adverse claimant.¹⁶

But since most of the equitable interests that can now arise in Virginia are embraced by the registry laws, and expressly declared by these statutes to be void as to creditors and subsequent purchasers, unless and until duly admitted to record, this doctrine has lost much of its importance, for it has always been held that this equitable ground of priority and relief is not to be admitted to sustain the prior against the subsequent incumbrancer, *contrary to the positive provisions of a statute*.¹⁷

16. 2 Min. Insts. 965; 2 Lom. Dig. 487; *Burgh v. Francis*, 1 P. Wms. 279, 1 Eq. Abr. 320; *Finch v. Earl of Winchelsea*, 1 P. Wms. 282; *Coleman v. Cocke*, 6 Rand. (Va.) 618, 18 Am. Dec. 757; *Withers v. Carter*, 4 Gratt. (Va.) 407, 50 Am. Dec. 78; *McClure v. Thistle*, 2 Gratt. 182; *Eidson v. Huff*, 29 Gratt. 341; *Floyd v. Harding*, 28 Gratt. 401; *Griggsby v. Osborne*, 82 Va. 371; *McCandlish v. Keen*, 13 Gratt. 630; *Dulany v. Willis*, 95 Va. 606, 64 Am. St. Rep. 815, 29 S. E. 324.

17. 2 Min. Insts. 966, 967; *McClure v. Thistle*, 2 Gratt. (Va.) 182; *Eidson v. Huff*, 29 Gratt. 341. But where the registry laws, or other statutes, do *not avoid* the equitable interest as to *creditors*, this doctrine is still applicable. Thus in the case of a *resulting* or *constructive trust* (where the equitable interest of *cestui que trust* is not required to be recorded) while a *purchaser* from the trustee, without notice of the equity, takes free therefrom, a *creditor* of the trustee may subject only such interest as the *debtor actually has*, and is postponed to the equitable title of *cestui que trust*. See *Dulany v. Willis*, 95 Va. 606, 64 Am. St. Rep. 815, 29 S. E. 324. So, while the *general creditors of a decedent* acquire a lien or a specific right to charge the debtor's land upon his death, they acquire this right subject to any equitable interests attaching thereto before or at the time of his death. *Dulany v. Willis*, *supra*; *McCandlish v. Keen*, 13 Gratt. 615.

(1583)

§ 1405. Same—What Instruments Required to Be Registered as to Creditors.

For the most part, the policy of the registry laws in Virginia is to protect creditors as well as subsequent purchasers.

But there are certain transactions, the registry of which is required by the statute only as against *subsequent purchasers* for value and without notice. It is immaterial whether these are ever registered so far as *creditors* are concerned. Such are the liens of judgments,¹ *lis pendens*² and attachments,³ premiums of the Mutual Assurance Society of Virginia for insurance upon buildings against fire,⁴ and wills of land.⁵

Hence, while a deed of conveyance, mortgage, deed of trust or contract to convey land is *void* as against a *subsequent judgment* or *attachment* obtained against the grantor, unless it be duly admitted to record at the time the lien of the judgment or attachment is *obtained*,⁶ a judgment or attachment against the owner of land is not void as to a *subsequent judgment or attachment* obtained against the same owner, though the latter be recorded first or though neither be recorded at all. Such a case, is simply not within the registry laws.⁷

§ 1406. Same—II. Who Are the "Purchasers" Protected by the Registry Laws.

The statute itself defines the "purchasers," as to whom unregistered deeds and writings shall be void, declaring that the term shall not be restricted merely to *purchasers from the grantor*, but shall embrace *all purchasers* who, but for the deed or

1. Va. Code, 1904, § 3570; ante, §§ 1390, 700.

2. Va. Code, 1904, § 3566; ante, §§ 1390, 711. Save in cases of suits to set aside *fraudulent conveyances*. Va. Code, 1904, § 2460; ante, § 1171.

3. Va. Code, 1904, § 3566; ante, §§ 1390, 710.

4. Va. Code, 1904, § 2498b; ante, § 1390.

5. Va. Code, 1904, §§ 2547, 2547a; ante, §§ 1390, 1281.

6. Va. Code, 1904, § 2465; *Slater v. Moore*, 86 Va. 26, 9 S. E. 419.

7. Va. Code, 1904, §§ 3570, 3566; *Gurnee v. Johnson*, 77 Va. 712, 725; *Hart v. Haynes*, 1 Va. Dec. 201, and note.

(1584)

writing, would have had *title* to the property conveyed, or a *right to subject* it to their debts.¹

Purchasers are understood to include all persons who, *by contract*, have acquired a *direct interest in the subject*, whether *by way of lien*, as by mortgage or deed of trust, or *by absolute conveyance*, in contradistinction to *creditors*, who are persons claiming debts or demands, and have only a lien arising *by act of the law* (e. g., by judgment, attachment, etc.), and not *by contract*.²

Thus, not only are absolute grantees of the legal or equitable title regarded as purchasers, but so also are *mortgagees* and *deed of trust creditors*;³ nor can the latter pretend any longer to be regarded as *creditors*, nor in the double aspect of creditors and purchasers, but only as *purchasers*; whilst persons claiming debts and demands, whether arising out of contract or tort, who have only acquired the right to charge the land by means of a recognizance, judgment, forthcoming bond returned, attachment, or other lien arising *by act of the law*, come under the designation of *creditors*.⁴

The purchaser designed to be protected is the "*subsequent purchaser for value and without notice*," from which it is a necessary inference that a purchaser *for value* from him, even *with notice*, is also to be protected, as incident to the protection afforded the first innocent purchaser; and so also, if one purchases *for value and without notice* from a purchaser who *has notice*, he is entitled to protection.⁵

1. Va. Code, 1904, § 2472.

2. 2 Min. Insts. 967; Tate v. Liggatt, 2 Leigh (Va.) 104; Wickham v. Lewis, Martin & Co., 13 Gratt. (Va.) 430, 432, 437; Davis v. Beazley, 75 Va. 491; Davis v. Sims, 1 Va. Dec. 390. See Gordon v. Rixey, 76 Va. 698; ante, § 595.

3. 2 Min. Insts. 967; 2 Lom. Dig. 449, 489; Beverley v. Brooke, 2 Leigh (Va.) 446; Wickham v. Lewis, Martin & Co., 13 Gratt. (Va.) 430, 432, 437; Evans v. Greenhow, 15 Gratt. 157; Carter v. Allen, 21 Gratt. 247; Davis v. Beazley, 75 Va. 491.

4. 2 Min. Insts. 967, 968.

5. 2 Min. Insts. 968; Lacy v. Wilson, 4 Munf. (Va.) 313; Curtis v. Lunn, 6 Munf. 42; Spengler v. Snapp, 5 Leigh (Va.) 478; French v. Loyal Co., 5 Leigh 627, 640, 648.

§ 1407. Same—1. The Purchaser Must Be a Subsequent Purchaser.

The statutes of registry prescribe that the deed or writing, if unregistered, shall be *void* as to *subsequent* purchasers of the *same land*.¹ And one becomes a purchaser at the time of the *execution and delivery* of the deed or writing under which he claims, not at the date of its *recording*,—at least, where the party claiming priority over him is himself a prior *purchaser*, and not a *creditor*.²

Hence, if a deed of conveyance, mortgage or deed of trust be executed, constituting the grantee therein a *purchaser*, and subsequently the same land be conveyed or mortgaged before the former is duly admitted to record (making allowance for the ten days of grace after the date of acknowledgment given by the statute in case of a deed of *conveyance*), the date when the subsequent conveyance, mortgage or deed of trust is *admitted to record* is immaterial;—it may even be postponed beyond the date of the registry of the prior conveyance or incumbrance. The date of the *registry* of such later deed is important as respects *subsequent*, but not as respects *prior*, purchasers.³

But if the prior transaction, instead of a deed or mortgage, is a judgment, attachment, etc., so that the party claiming thereunder is not a *purchaser*, but a *creditor*, it is believed that other principles must be applied. In such case, while the judgment, attachment, etc., is void as to a *subsequent purchaser* of the land, until recorded, the deed or mortgage of the subsequent purchaser is void as to *creditors* until it is duly admitted to record. Each is void as to the other under the terms of the

1. Va. Code, 1904, §§ 2465, 2472, 3566, 3570; *Harman v. Oberdorfer*, 33 Gratt. (Va.) 497.

2. In such case, registry of the later deed is not required at all, since it is necessary only as against *subsequent*, not *prior*, purchasers. Va. Code, 1904, § 2465.

3. 2 Min. Insts. 968; 2 Lom. Dig. 493; *Bridgewater Roller Mills v. Strough*, 98 Va. 721, 37 S. E. 290; *Lynchburg Perpetual Building Ass'n v. Fellers*, 96 Va. 337, 70 Am. St. Rep. 851, 31 S. E. 505. (1586)

statutes, and it is said that in such case the one *first recorded* should take priority.⁴

§ 1408. Same—2. The Subsequent Purchaser Must Be a Purchaser for Value.

The statutes of registry expressly describe the persons to be protected as “subsequent purchasers for valuable consideration and without notice.”¹

As heretofore shown,² *marriage* was at common law deemed an eminently valuable consideration, and one who took a deed of land in consideration of his or her marriage to the grantor or mortgagor was a “purchaser *for value*.” And although the Virginia statute of Voluntary Conveyances has now placed such conveyances on the same footing with conveyances *without consideration*, so far as concerns their validity as against *existing creditors* of the grantor, declaring that they shall be absolutely void as to such creditors,³ it is believed that the effect of the statute extends no further, and that even to-day in Virginia one who takes a conveyance in consideration of his or her marriage is a “purchaser *for value*” under the *registry acts*.⁴

It will also be remembered that while a creditor secured by the lien of a judgment or attachment upon land is still nothing more than a *creditor*, one who is secured by a mortgage or deed of trust is a *purchaser for value*, and not a creditor.⁵ This is not necessarily to say that one who takes a conveyance, mortgage or deed of trust upon land in satisfaction of or to secure an *antecedent debt* is a purchaser for value, and in most jurisdic-

4. *Hill v. Rixey*, 26 Gratt. (Va.) 72, 80, et seq. For a discussion of this decision, see post, § 1418.

1. Va. Code, 1904, §§ 2465, 3566, 3570, et seq.; ante, § 1390.

2. Ante, § 1181.

3. Va. Code, 1904, § 2459; ante, § 1181.

4. Ante, § 1181; *Snyder v. Grandstaff*, 96 Va. 479, 70 Am. St. Rep. 863, 31 S. E. 647.

5. Ante, § 1407; 2 Min. Insts. 967, 968.

tions perhaps he is not so regarded.⁶ But in Virginia antecedent indebtedness is a sufficient consideration to support a conveyance, mortgage or deed of trust.⁷

§ 1409. Same—3. Purchaser Must Be a “Complete Purchaser.”

In the next place, in order that the purchaser may be protected under the registry laws, he must have done something more than merely *bound himself to pay* a consideration. The authorities are emphatic in declaring that he must be a “*complete purchaser*,” that is, he must have *paid the whole* of the purchase money and have *received his conveyance* before he received notice of the prior unregistered conveyance or incumbrance,—he must have become a “*complete purchaser*.”¹

The allegation that one is such a purchaser must usually aver (1) a *conveyance*, and not merely a *contract to convey*; (2) a valuable consideration and the *actual payment* thereof, and not merely that it is *secured to be paid*; and (3) it must explicitly *deny notice* of the unregistered writing *previous* to the execution of the subsequent conveyance or incumbrance, under which

6. *Goodwin v. Mass. Loan & Trust Co.*, 152 Mass. 189; *Weaver v. Barden*, 49 N. Y. 286; *Liggett Spring & Axle Co.’s Appeal*, 111 Penn. St. 291; *Jones v. Robinson*, 77 Ala. 499; *Funk v. Paul*, 64 Wis. 35, 54 Am. Rep. 576; *Boxheimer v. Gunn*, 24 Mich. 372; *Chance v. McWharter*, 26 Ga. 315; *Gilchrist v. Gough*, 63 Ind. 576, 30 Am. Rep. 250.

7. 2 Min. Insts. 696, 234. So a purchaser of real estate who is compelled to pay a pre-existing lien thereon for his own protection is not a volunteer but a purchaser for value. See *Fulkerson v. Taylor*, 100 Va. 426, 41 S. E. 863.

1. Ante, § 489; 2 Min. Insts. 968, 235; *Beverley v. Brooke*, 3 Leigh (Va.) 446; *Doswell v. Buchanan*, 3 Leigh, 381, 383, 23 Am. Dec. 280; *Mutual Assurance Society v. Stone*, 3 Leigh, 235; *Briscoe v. Ashby*, 24 Gratt. (Va.) 454, 475; *Wasserman v. Metzger*, 105 Va. 744, 54 S. E. 893; *Tourville v. Naish*, 3 P. Wms. 307; *Wigg v. Wigg*, 1 Atk. 384. This doctrine is not confined to courts of equity, but applies equally in an action of ejectment brought by the innocent purchaser against a prior grantee under an unregistered deed. *Bugg v. Seay*, 107 Va. 650, 60 S. E. 89.

(1588)

the complete purchaser claims, and to the payment of the consideration.²

If the subsequent purchaser receive notice of the prior conveyance or incumbrance before *both* of these affirmative acts are accomplished, he must forbear to proceed further until the equity is inquired into, or else he takes subject thereto. Whatever he does after notice is done *mala fide* and cannot avail him. And this is in consonance with justice as well as in strict analogy to equitable principles. It rests upon the reasonable maxim, *qui prior in tempore, potior est in jure*.³

Thus, if A has made a first purchase of an estate (unregistered), and B proposes to purchase the same tract subsequently from A's grantor, so soon as B receives notice of A's prior claim, it is obviously a fraud in him to take a single further step to obtain a title to property which he knows belongs to another. But if he has paid the consideration and has also obtained a conveyance of the land before notice reaches him of the unregistered writing, his conduct has been fair and unimpeachable, and having *equal*, though *posterior*, equity, he is protected because he has the *legal title also*, honestly acquired, agreeably to the maxim, of which we have encountered several instances, that "where equities are equal, the law (or legal title) shall prevail."⁴

To this general doctrine a qualification must be noted,—at least, in Virginia,—namely, that where the *first* purchaser has *not the legal title*, and the subsequent one *has paid his money* and has not received indeed the *legal title*, but the *best right to call for the legal title*, before he receives notice, he shall be entitled to priority notwithstanding he has not actually acquired such title.⁵

2. 2 Min. Insts. 968, 969, 235; 3 Sugden, Vendors, 348; Mitford, Eq. Pl. 215, 216; Wasserman v. Metzger, 105 Va. 744, 54 S. E. 893.

3. 2 Min. Insts. 969.

4. 2 Min. Insts. 969; Mutual Assurance Society v. Stone, 3 Leigh (Va.) 236; Cox v. Romine, 9 Gratt. (Va.) 28; Wasserman v. Metzger, 105 Va. 744, 54 S. E. 893.

5. 2 Min. Insts. 969; Preston v. Nash, 76 Va. 1, 11 (correcting doctrine erroneously stated in 75 Va. 949, 956-7); Wasserman v. Metzger (1589)

The common law doctrine of the "complete purchaser," whereby one, though he had paid part of the consideration, if he received notice of a prior claim before completing the payment (or even after paying the *whole*, if he received notice before obtaining his conveyance) would lose all claim upon the land, is so rigorous that it has attracted the attention of the legislature, and since 1887 in Virginia it has been enacted that "As against any person claiming under a deed or other writing which shall not have been admitted to record before payment by a subsequent purchaser for valuable consideration of the *whole* or a *part* of his purchase money, such subsequent purchaser, notwithstanding such deed or other writing be admitted to record before he becomes a complete purchaser, shall *in equity* have a *lien* on the property purchased by him for so much of his purchase money as he may have paid before notice."⁸

§ 1410. Same—Illustrations of Doctrine of Complete Purchaser.

One of the earliest English cases upon the subject is *Tourville v. Naish*,¹ where Naish purchased land, and having paid part of the purchase money, gave his *bond* for the residue. Tourville then had an equitable lien on the premises of which Naish, as the latter alleged, had no notice at the time of making the purchase, but of which he admitted he was apprised before payment of the money for which he had given his bond. It was insisted on his behalf that the giving of a bond *was a payment*, since the bond obliged him at all events to go on to pay and precluded *at law* any plea of equitable incumbrance. Lord Chancellor Talbot however decided that notice *before the payment of the purchase money* was sufficient to avoid the plea of purchaser for value, etc., and that the bond was not equivalent to payment,

ger, 105 Va. 749, 54 S. E. 893; *Lamar v. Hale* 79 Va. 147; *Fulkerson v. Taylor*, 102 Va. 314, 319, 46 S. E. 309.

6. Va. Code, 1904, § 2472; 2 Min. Insts. 969. This statute does not seem to apply if the subsequent purchaser obtains notice of the prior claim otherwise than by its tardy admission to record.

1. 3 P. Wms. 307.
(1590)

for though the purchaser had no remedy *at law* against the bond, yet he might have been relieved against it *in equity*.²

The Virginia case of *Beverley v. Brooke*,³ affords an illustration of the rigor with which the rule is applied at common law. In that case, Beverley had obtained a lien on Pickett's land by deed of trust which was unregistered. Afterwards, Pickett proposed to give a second deed of trust to Scott for the benefit of himself (Scott) and others, to secure money advanced by them. It appeared that after the last mentioned deed was prepared, and when Pickett had *taken the pen in his hand* to execute it, he observed casually to Scott that he had already executed a deed of trust on part of the same land to secure a debt to Beverley, but that the deed was usurious. This was held to charge Scott and all claiming under the deed to him with notice of Beverley's prior unrecorded deed, making this latter as valid against Scott and his associates as if it had been duly registered, liable to be impeached for usury, as it would have been if registered, and not otherwise.⁴

§ 1411. Same—4. Purchaser Must Be without Notice of Prior Conveyance or Incumbrance—A. Notice Must Be Clear.

The effect of notice is to attach to the subsequent purchaser the guilt of fraud or *mala fides*,—*constructively*, at least. It is therefore never to be *presumed*, but must be proved, and proved

2. 2 Min. Insts. 969, 970, the case of *Wigg v. Wigg*, 1 Atk. 384, was decided by Lord Hardwicke five years afterwards (1739) in accordance with *Tourville v. Naish*. The circumstances are not stated, but the chancellor says that "it appears he had notice, for though he had no notice before he *paid his money*, yet he had notice before the *execution of the conveyance*, and it is all but one transaction." See also, *Story v. Lord Windsor*, 2 Atk. 630; 2 Min. Insts. 970.

3. 2 Leigh 425, 446.

4. 2 Min. Insts. 970. See also, *Wilcox v. Calloway*, 1 Wash. (Va.) 41; *Blair v. Owles*, 1 Munf. (Va.) 44; *Lambert v. Nanny*, 2 Munf. 196; *Hoover v. Donnally*, 3 Hen. & M. (Va.) 316; *Carter v. Allen*, 21 Gratt. (Va.) 241.

(1591)

clearly. A mere suspicion of notice, however strong, will not suffice.¹

Hence, neither the *registry* nor *actual notice* of a deed, which is so vaguely expressed as to give no information as to the property embraced in it, or not enough to show that a subsequent deed embraces such property, will suffice to put the subsequent purchaser on legal notice.²

Thus, in *Mundy v. Vawter*,³ it was held that a conveyance of "all the estate . . . to which J (the grantor), is in any manner entitled at law or in equity," though good and valid *as between the parties*, contained so indefinite a description of the lands intended to be conveyed that the registry thereof was, in point of law, not notice of the existence of the conveyance to a subsequent purchaser from the grantor; nor would notice in *point of fact* of the deed and its contents affect such purchaser, unless he had further information that the land purchased by him was embraced in the provisions of the deed;—information so strong and clear as to affect his conscience and to fix upon him the imputation of *mala fides*.⁴

But whilst the proof of notice is required to be explicit and

1. 2 Min. Insts. 977; 3 Sugden, Vendors, 260, et seq.; *Hine v. Dodd*, 2 Atk. 276; *Jollard v. Stainbridge*, 3 Ves. Jr. 478, n. (a), 486; *Le Neve v. Le Neve*, 2 White & Tud. Lead. Cas. Eq. 165, et seq.; *Curtis v. Lunn*, 6 Munf. (Va.) 44; *Vest v. Michie*, 31 Gratt. (Va.) 151, 31 Am. Rep. 722; *Johnson v. Bank*, 33 Gratt. 485, 486; *Hunton v. Wood*, 101 Va. 61, 43 S. E. 186; *Bridgewater Mills Co. v. Strough*, 98 Va. 721, 37 S. E. 290; *Fischer v. Lee*, 98 Va. 163, 35 S. E. 441.

2. 2 Min. Insts. 977; *Lewis v. Madison*, 1 Munf. (Va.) 303; *Mundy v. Vawter*, 3 Gratt. (Va.) 545. See *Florance v. Morien*, 98 Va. 26, 34 S. E. 890; *Clark v. Hutzler*, 96 Va. 73, 30 S. E. 469; *State Sav. Bank v. Stewart*, 93 Va. 447, 25 S. E. 543; *Merritt v. Bunting*, 107 Va. 178, 179, 57 S. E. 567.

3. 3 Gratt. (Va.) 545.

4. 2 Min. Insts. 977, 978. In *Florance v. Morien*, 98 Va. 26, 34 S. E. 890, the property was described as "all the right, title and interest of said Morien and wife in and to the real estate lying in the county of Henrico of which Richard Morien died seised and possessed." This was held a sufficient description. See also, *State Sav. Bank v. Stewart*, 93 Va. 447, 25 S. E. 543; *Clark v. Hutzler*, 96 Va. 73, 30 S. E. 469. (1592)

clear, so as not merely to put the party on inquiry, but to affect his conscience and to fix upon him the imputation of *mala fides*, the fact of notice may as well be *inferred from circumstances* as proved by *direct evidence*;—circumstantial evidence being capable of producing upon a well ordered understanding a conviction as satisfactory and complete as that which is direct.⁵

Though we need make no discrimination between *actual* and *constructive notice*, in respect to the *effect* of either, it is well to discriminate between them in determining *what constitutes notice*. Let us therefore observe briefly what amounts to (1) actual notice; and (2) constructive notice.

§ 1412. Same—B. What Amounts to Actual Notice.

Notice is *actual* when the purchaser *knows* of the existence of the adverse claim, or perhaps, where he is *conscious* of having the *means of knowledge*, and yet does not use them; and it is immaterial whether his knowledge results from direct information or is gathered from facts and circumstances.¹

The information must proceed, however, from some person interested, or otherwise likely to be well informed, or from some one who gives specific and definite statements,—and that, in the course of the treaty for the purchase. Vague reports or general assertions, especially from persons not interested in the property and who therefore may not be well informed, will not affect the purchaser's conscience; nor will he be charged with a notice acquired in a *previous transaction*, for he may have forgotten it.²

5. 2 Min. Insts. 978; 2 Lom. Dig. 492; Hiern *v.* Mill, 13 Ves. 120; Newman *v.* Chapman, 2 Rand. (Va.) 93, 101, 14 Am. Dec. 766; French *v.* Loyal Co., 5 Leigh (Va.) 641, 655, 677; Siter *v.* McClanachan, 2 Gratt. (Va.) 280, 313; Hunton *v.* Wood, 101 Va. 54, 43 S. E. 186.

1. 2 Min. Insts. 978; Le Neve *v.* Le Neve, 2 White & Tud. Lead. Cas. Eq. 144; Morris *v.* Terrell, 2 Rand. (Va.) 6; French *v.* Loyal Co., 5 Leigh (Va.) 627, 655, 677.

2. 2 Min. Insts. 978, 979; 3 Sugden, Vendors, 451, 452; Jolland *v.* Stainbridge, 3 Ves. Jr. 478, 486; Le Neve *v.* Le Neve, 2 White & Tud. Lead. Cas. Eq. 132, 145, 148, et seq.; Argenbright *v.* Campbell, 3 Hen. & M. (Va.) 144, 189, 198. See Butcher *v.* Stapelcy, 1 Vern. 364, 365.

(1593)

§ 1413. Same—C. What Amounts to Constructive Notice—In General.

Constructive notice in its nature is no more than *evidence of notice*, the presumptions of which are so violent that they may not be controverted, or else presumptions of notice that are made conclusive by statute, as in case of the registry acts. It is that notice which the *law imputes* to a person, whether he has actual knowledge of the thing or not;—may, though it be clearly proved that he had not such actual knowledge. It differs therefore essentially from *actual notice* which, whether it be proved by *presumption* or *direct evidence*, must appear clearly to have *actually existed*.¹

The instances of constructive notice are referable to several classes, all depending on the general consideration that *sound policy* requires the presumption that he was aware, or at least that he should be treated as if he were aware, of the existence of the prior claim. They are as follows:

(1) Where the subsequent purchaser has *actual notice* that the property in question was incumbered or affected, he is charged with *constructive notice* of all *facts and instruments*, to the knowledge of which he would have been led by an examination of the incumbrance or other transaction affecting the property of which he had actual notice.²

(2) Where the subsequent purchaser has *designedly abstained from inquiry* for the very purpose of avoiding notice; or perhaps, where he has been guilty of *gross negligence* in omitting such inquiry.³

1. 2 Min. Insts. 979; 3 Sugden, Vendors, 453; French v. Loyal Co., 5 Leigh (Va.) 658, 677, 678.

2. 2 Min. Insts. 979; Le Neve v. Le Neve, 2 White & Tud. Lead. Cas. Eq. 132, 136, 153, et seq.; Jones v. Smith, 1 Phil. (19 Eng. Ch.) 253, et seq.; Brush v. Ware, 15 Pet. 93; Oliver v. Pratt, 3 How. 333, 409; Graff v. Castleman, 5 Rand. (Va.) 207, 16 Am. Dec. 741; Beverly v. Brooke, 2 Leigh (Va.) 446; Burwell v. Fauber, 21 Gratt. (Va.) 462; Lamar v. Hale, 79 Va. 147; Effinger v. Hall, 81 Va. 94; Robinson v. Crenshaw, 84 Va. 356, 5 S. E. 222. See Kelley v. Fairmount Land Co., 97 Va. 227, 33 S. E. 598.

3. 2 Min. Insts. 979; Le Neve v. Le Neve, 2 White & Tud. Lead. (1594)

(3) Where the counsel, attorney or agent of the subsequent purchaser, whether for the whole or a part of the transaction, or one *closely followed by or connected with it*, has notice of the prior incumbrance or claim, *whilst concerned for his principal*. In such case the notice of the agent is notice to the principal.⁴

(4) Where the adverse claimant is in the *actual possession and occupancy* of the land, or any *part* thereof, when the subsequent purchase occurs, the subsequent purchaser is, independently of statute, deemed to have constructive notice of the title under which such claimant occupies the premises.⁵ If, however, such adverse possession is under a title *of record*, it is not notice of any rights in the occupant other than those that appear in *the record*, the subsequent purchaser being justified in ascribing the occupant's possession to his *record title*.⁶ And if the occupant is the *tenant* of another, the purchaser is charged

Cas. Eq. 133; Taylor v. Hibbert, 2 Ves. Jr. 437, 440; Hiern v. Mill, 13 Ves. 120, 121; Dryden v. Frost, 3 My. & Cr. (14 Eng. Ch.) 673; Jones v. Smith, 1 Phil. (19 Eng. Ch.) 253, et seq.

4. 2 Min. Insts. 980; 3 Sugden, Vendors, 318, et seq.; Le Neve v. Le Neve, 2 White & Tud. Lead. Cas. Eq. 139, et seq., 149, et seq.; Hiern v. Mill, 13 Ves. 120; Dryden v. Frost, 3 My. & Cr. (14 Eng. Ch.) 673; Astor v. Wells, 4 Wheat. 466; Blair v. Owles, 1 Munf. (Va.) 38, 44; Morrison v. Bausemer, 32 Gratt. (Va.) 229; Johnson v. Bank, 33 Gratt. 486, 487. The relation of principal and agent arises between the trustee in a deed of trust and the beneficiaries therein as soon as the transaction is completed, and from that time notice to the trustee is notice to the beneficiaries; and the fact that the trustee declines to accept the trust and a successor is appointed is immaterial, since the trust in the hands of the successor is tainted with all the imperfections that attached to it in the hands of the original trustee. Merchants' Bank v. Ballou, 98 Va. 112, 81 Am. St. Rep. 715, 44 L. R. A. 306.

5. 2 Min. Insts. 980; 3 Sugden, Vendors, 329, et seq.; Hiern v. Mill, 13 Ves. 121; Le Neve v. Le Neve, 2 White & Tud. Lead. Cas. Eq. 134, et seq., 150, et seq.; Chapman v. Chapman, 91 Va. 397, 50 Am. St. Rep. 846, 1 Va. Law Reg. 195; Rorer Iron Co. v. Trout, 83 Va. 397, 5 Am. St. Rep. 285, 2 S. E. 713.

6. Plumer v. Robertson, 6 Serg. & R. (Penn.) 184; Great Falls Co. v. Worster, 15 N. H. 412; Smith v. Yule, 21 Cal. 180, 89 Am. Dec. 167; Fargason v. Edrington, 49 Ark. 207.

(1595)

with notice of the *landlord's* title as well as that of the *tenant*.⁷

But in Virginia it is now expressly provided that the *possession* of any real estate or of a term therein, without notice of other evidence of title, *shall not be notice* to a subsequent purchaser for value.⁸

(5) Where the prior claim or incumbrance depends upon a *public act of the legislature*. Every one is presumed to take notice of *public statutes*.⁹

(6) Where the prior claim or incumbrance has been *duly registered* under the registry acts.¹⁰ This will be examined a little more fully in the following sections.

§ 1414. Same—Effect of Registry as Constructive Notice.

The Virginia statutes of registry merely declare that unregistered writings shall be *void* as to creditors and subsequent purchasers for value and without notice except and until they are duly admitted to record.¹ They do not provide that any and all such writings shall be *valid* as to such parties in case they are duly admitted to record. Whether or not they are thus valid depends upon the circumstances surrounding the title of him who executes the writing. If he has merely a *latent or hidden equity*, which would not be disclosed by an examination of the records, one who takes a transfer or mortgage of such equity from him cannot, by having such transfer or mortgage registered, thereby give notice of the latter's claim to a subse-

7. Phelan v. Brady, 119 N. Y. 587; Hottenstein v. Lerch, 104 Penn. St. 454; Brunson v. Brooks, 68 Ala. 248; Tillotson v. Mitchell, 111 Ill. 523; Wilkins v. Bevier, 43 Minn. 213, 19 Am. St. Rep. 238; Glendenning v. Bell, 70 Tex. 632; O'Rourke v. O'Connor, 39 Cal. 442.

8. Va. Code, 1904, § 2465.

9. 2 Min. Insts. 980; Le Neve v. Le Neve, 2 White & Tud. Lead. Cas. Eq. 143; Pomfret v. Windsor, 2 Ves. Sr. 472, 480.

10. 2 Min. Insts. 980; Va. Code, 1904, §§ 2465, 3566, 3567, 3570, et seq.; Le Neve v. Le Neve, 2 White & Tud. Lead. Cas. Eq. 143, 157, et seq., 160, et seq.; Pillow v. Southwest Improvement Co., 92 Va. 145, 23 S. E. 32, 53 Am. St. Rep. 804.

1. Va. Code, 1904, § 2465.

quent purchaser of the land who buys from the former after he has acquired a title which has been registered.²

Thus, if A *orally contracts* to sell B a tract of land, placing B in possession thereof, giving B an *equitable title* thereto, and B then mortgages the land to C by deed *duly registered*, after which A *conveys* the land to B by deed duly registered, and B conveys the land to D, who has *no actual notice* of B's pre-existing *equitable title*, the registry of B's mortgage to C is not notice to D of the existence of B's pre-existing equitable interest, nor of C's claim thereto.

The case of *Doswell v. Buchanan*,³ which arose at a time when *written* contracts to convey land, though unregistered, created an *equitable title* in the grantee, even as against subsequent purchasers, furnishes an excellent illustration of this principle. In that case, a contract was made to convey land to Hopkins, the contract not being (nor required to be) recorded. Hopkins mortgaged the land to Buchanan, which mortgage was duly recorded. Then Hopkins applied for and obtained from his vendor a deed conveying to him the legal title, after which he conveyed the land to Doswell. Buchanan then brought suit to have the land subjected to his mortgage, claiming that the *registry* of it gave Doswell notice thereof, though it was executed prior to the *deed* to Hopkins. Upon these facts the court held that a vendee could not lawfully be required to examine the registry *further back* than the *date of the conveyance* to the vendor, unless he has *actual notice* of an interest of the vendor antedating the deed to the vendor.

The principle thus enunciated has now been incorporated into a statute, which enacts that "a purchaser shall not be affected (1) by the record of a deed or contract made by a person under whom *his title is not derived*, nor (2) by the record of a deed or contract made by *any person before the date* of a deed or contract made to or with *such person*, which is *duly admitted to record*, and from which the *title of such person is derived*."⁴

2. 2 Min. Insts. 973, et seq.

3. 3 Leigh (Va.) 365, 381, 23 Am. Dec. 280.

4. Va. Code, 1904, § 2473. See *Pillow v. Southwest Improvement Co.*, 92 Va. 144, 53 Am. St. Rep. 804, 23 S. E. 32.

A brief analysis will show that this statute contemplates two distinct cases, in which the registry of a deed or contract will *not affect* a subsequent purchaser with notice:

1. Where the deed or contract thus registered is *made* by a person under whom the *purchaser's title is not derived*.

Hence, it would seem that, if A has acquired a title to B's land by adverse possession for the statutory period, a purchaser from A would not be affected by the record of a deed or contract made by B to or with a third person with reference to the land.

2. Where the deed or contract thus registered is made by *any person* (whom we may call A) *before the date* of a deed or contract made to or with such person (A), which is *duly admitted to record*, and from which *the title of such person (A) is derived*.

In order that this clause of the statute may apply, three conditions must unite:

(a) The deed or contract, the effect of whose registry is in question, must have been *made before the date* of the deed or contract under which the grantor in the first writing claims title;

(b) The latter writing must have been *duly admitted to record*;

(c) The latter writing must be the *source of title* of the grantor in the first writing.

§ 1415. Priorities under the Registry Statutes.

Conflicts often arise between lien creditors of an insolvent as to which of them shall have priority in enforcing their claims upon his land, where it is insufficient to satisfy all; or between creditors having a lien upon the debtor's land by judgment or attachment and purchasers of the land; or between conflicting claims of several purchasers of the same tract.

Before closing the discussion of registry, it will be well, even at the expense of some repetition, to examine briefly the effect of the registry laws as applied in such cases.

We shall therefore consider such conflicts as they arise: (1) Between lien creditors; (2) Between purchasers of the same (1598)

tract; and (3) Between lien creditors on the one side and purchasers on the other.

§ 1416. Same—1. Conflicts between Lien Creditors.

It will be recalled that the "*creditors*" who are in any wise affected by the registry laws in Virginia are all such creditors, and only such, as have secured a *lien* by judgment, attachment, etc., and that a creditor secured by a mortgage or deed of trust is not a creditor at all under these statutes, but a purchaser.¹ It will be remembered also that the lien of a judgment or attachment is required to be recorded *only as against subsequent purchasers* of the debtor's land.²

It will be readily seen therefore that if a conflict arises between two such creditors of the same debtor, each of whom is secured by a judgment or attachment lien, the recordation of such judgment or attachment is entirely immaterial, and of course so would be the relative dates of such recordation, for the statute requires liens of this sort to be recorded *only as against subsequent purchasers*, and not as against *other creditors*.⁵

In such case, it is well established in Virginia that the judgment or attachment creditors are to be satisfied out of the land in the direct order of the dates of their judgments, etc., the senior being entitled to priority over the junior.⁶ If, however, the judgments, etc., are all obtained *at the same time*, and the land is insufficient to satisfy them all, they are to be paid *pro rata*.⁷

But an exception to this general rule is made by statute in Virginia in regard to mechanics' liens, it being provided that

1. Ante, § 1404.

2. Va. Code, 1904, §§ 3566, 3570; ante, § 1390.

5. Va. Code, 1904, §§ 3566, 3570.

6. Ante, § 700; *Haleys v. Williams*, 1 Leigh (Va.) 140, 19 Am. Dec. 743; *Fox v. Rootes*, 4 Leigh 429; *Hill v. Rixey*, 26 Gratt. (Va.) 72, 81; *Rhea v. Preston*, 75 Va. 757, 768; *Grantham v. Lucas*, 24 W. Va. 231.

7. Ante, § 700; Va. Code, 1904, § 3576. See *Janney v. Stephen*, 2 Pat. & H. (Va.) 11.

there shall be *no priority* among such liens, except that the lien of a *subcontractor* shall be preferred to that of *his general contractor*.⁸ But it has been decided, notwithstanding this statute, that the lien of a subcontractor, who has also secured the *personal liability* of the owner, it is to be preferred to one who has nothing but his lien.⁹

§ 1417. Same—2. Conflicts between Purchasers of the Same Tract.

Creditors secured by mortgage or deed of trust, being regarded as purchasers,¹ are on the same plane as persons claiming the land under conveyance or contract to convey. As to all of these the statute of registry provides substantially that the instrument under which they claim shall be void as to creditors and as to *subsequent purchasers* for value and without notice, except and until it be duly admitted to record.²

It will be seen therefore that where the contest is confined to *purchasers* the registry laws affect only *subsequent*, not *prior*, purchasers. Hence, if G conveys land to A on January 1, by deed recorded on May 1, and conveys or mortgages the same land to B on February 1, B takes the land free from A's claim (supposing B to be a purchaser *for value and without notice* of A's claim); for B becomes a purchaser on February 1, at which time A's deed is void as to B, and since B is only bound to register his deed as to creditors and *subsequent purchasers*, it is entirely immaterial, so far as A is concerned, whether he registers his deed before A records his or afterwards, or whether he ever registers it at all.³

8. Va. Code, 1904, § 2484; ante, § 724.

9. Schrieber v. Citizens' Bank, 99 Va. 257, 38 S. E. 134. See ante, § 721.

1. Ante, § 1404.

2. Va. Code, 1904, § 2465.

3. Ante, § 1407. For case of triangular duel between three creditors secured by mortgage or deed of trust, the deed of each of whom is superior to that of one of the others, see ante, § 660.

(1600)

§ 1418. **Same—3. Conflicts between Creditors on the One Side and Purchasers on the Other.**

If we suppose a mortgage, deed of trust or conveyance, passing certain land to A, to be executed by B on January 1, and registered July 1, and a judgment to be recovered against G by B on February 1, which judgment is not docketed until September 1; in a contest between A and B as to priorities, if the statutes of registry be applied to the case, it will be seen that B, the judgment creditor, should take priority; for his *judgment* is not required to be recorded at all as against A, who is a *prior*, not a *subsequent*, purchaser, while A's deed of trust, mortgage or conveyance is declared to be *void* as to *all lien creditors* (which includes B), as well as subsequent purchasers, except and until it be duly admitted to record.¹

If, however, the case be reversed, and B is supposed to obtain his *judgment* first, but A to take his title by mortgage or conveyance before B's judgment is *recorded*, a much more complex case is presented. For B's judgment, unless recorded when A becomes a purchaser (as it is not in the case supposed) is void as to A, since he is a *subsequent* purchaser for value and without notice;² but on the other hand, A's deed is void as to *all creditors*, prior as well as subsequent, until it is registered.³ Thus, so far as the strict letter of the registry statutes is concerned, each of these transactions is void as to the other.

Upon principles of justice and equity it would seem in such case that A should take priority, even though his deed be recorded last, because it is through B's neglect to record his judgment promptly that A has been induced to become a purchaser, whereas no amount of delay or of speed on A's part in registering his deed would or could have affected B, or have

1. Ante, § 1404; Price v. Wall, 97 Va. 334, 75 Am. St. Rep. 788, 33 S. E. 599.

2. Va. Code, 1904, § 3570. A becomes a purchaser at the date of the *execution* of his deed, not at the date of its *recordation*. Ante, § 1407.

3. Ante, § 1404; Va. Code, 1904, § 2465; Price v. Wall, 97 Va. 334, 75 Am. St. Rep. 788, 33 S. E. 599.

tended to mislead or warn him, since A's transaction is *subsequent* to B's. But in *Hill v. Rixey*,⁴ it has been decided that the priority of the transaction in such case depends upon *the order of registry*. In that case, the facts were that R recovered a judgment against G in 1860, but it was not recorded until 1868. W also recovered a judgment against G in 1861, which was recorded December 11, 1865. On November 21, 1865, G executed a deed of trust to J, but the deed was not registered until 1867. It will be observed that both R and W *recovered* their judgments before T's deed of trust was *executed*, but W's judgment was *docketed* before the *recordation* of T's deed, while R's was docketed afterwards. The court held that the *order of recordation* would determine the priorities, and that while R's judgment was first in point of time, it must be postponed, not only to the deed of trust which was recorded first, but to W's judgment, which by reason of its having been recorded before the recordation (though not before the execution) of T's deed, would take priority thereof.

4. 26 Gratt. (Va.) 72, 80, et seq.
(1602)

TABLE OF CASES.

[References to pages]

- | | |
|---|---|
| <p> <i>Abbiss v. Burney</i>, 860, 935.
 <i>Abbott v. Bradstreet</i>, 838.
 <i>Abbott v. Inhabitants, etc.</i>, 1510.
 <i>Abbott v. Kansas City R. Co.</i>, 155.
 <i>Abby v. Goodrich</i>, 1230.
 <i>Abercrombie v. Riddle</i>, 254.
 <i>Ackerman v. Hunsicker</i>, 701, 702.
 <i>Ackerman v. Phelps</i>, 399.
 <i>Ackroyd v. Smith</i>, 115, 116, 117, 164.
 <i>Ackroyd v. Smithson</i>, 568.
 <i>Acton v. Blundell</i>, 77.
 <i>Acton v. Woodgate</i>, 1242.
 <i>Adams v. Adams</i>, 1174.
 <i>Adams v. Beadle</i>, 52.
 <i>Adams v. Beekman</i>, 276.
 <i>Adams v. Gillespie</i>, 864.
 <i>Adams v. Marshall</i>, 131.
 <i>Adams v. Van Alstyne</i>, 147.
 <i>Addison v. Bowie</i>, 384.
 <i>Addison v. Core</i>, 1069.
 <i>Addison v. Hack</i>, 140, 160, 166, 168.
 <i>Addington v. Etheridge</i>, 1289.
 <i>Addington v. Wilson</i>, 1367.
 <i>Addy v. Grix</i>, 1380.
 <i>Aderholt v. Henry</i>, 728.
 <i>Agar v. Fairfax</i>, 1027, 1029, 1036.
 <i>Aggas v. Pickerell</i>, 704.
 <i>Ahrend v. Odiorne</i>, 759.
 <i>Aiken v. Gale</i>, 728.
 <i>Aiken v. Smith</i>, 445.
 <i>Aikman v. Harsell</i>, 394, 396.
 <i>Ainsworth v. Ritt</i>, 496.
 <i>Aitcheson v. Huebner</i>, 1540.
 <i>Akerly v. Vilas</i>, 1228.
 <i>Alabama State Land Co. v. Kyle</i>, 1108.
 <i>Albany's Case</i>, 1502.
 <i>Albert v. Albert</i>, 936. </p> | <p> <i>Albert v. State</i>, 477.
 <i>Alcutt v. Lakin</i>, 49.
 <i>Alderson v. Miller</i>, 479.
 <i>Aldin v. Clark</i>, 124.
 <i>Aldine M'fg Co. v. Barnard</i>, 43.
 <i>Aldred's Case</i>, 151, 152, 153.
 <i>Aldrich v. Cooper</i>, 719, 728.
 <i>Aldrich v. Husband</i>, 45.
 <i>Alexander v. Alexander</i>, 286, 346, 1492.
 <i>Alexander's Cotton</i>, 206.
 <i>Alexander v. De Kermel</i>, 1242.
 <i>Alexander v. Ellison</i>, 1002.
 <i>Alexander v. Hodges</i>, 647.
 <i>Alexander v. Mills</i>, 1500.
 <i>Alexander v. Newton</i>, 1300, 1457.
 <i>Alexandria Sav. Institution v. Thomas</i>, 700, 701, 702.
 <i>Alger v. Kennedy</i>, 508.
 <i>Allan v. Gomme</i>, 137.
 <i>Alleghany Co. v. Parrish</i>, 1110, 1117.
 <i>Allemong v. Grays</i>, 1227.
 <i>Allen v. Allen</i>, 240.
 <i>Allen v. Bartlett</i>, 464.
 <i>Allen v. Evans</i>, 148.
 <i>Allen v. Gibson</i>, 998, 1009.
 <i>Allen v. Howe</i>, 668.
 <i>Allen v. Papworth</i>, 596.
 <i>Allen v. Patrick</i>, 389, 725.
 <i>Allen v. Poole</i>, 1158.
 <i>Allen v. Smith</i>, 1430, 1524.
 <i>Allen v. Trustees</i>, 223, 869.
 <i>Allen v. Weber</i>, 78.
 <i>Allender v. Sussan</i>, 509.
 <i>Alley v. Carleton</i>, 135.
 <i>Alley v. Rogers</i>, 731, 786, 788.
 <i>Allison v. Allison</i>, 824, 826, 827, 830, 834, 836, 838, 865, 883, 1404. </p> |
|---|---|

[References to pages]

- Allison *v.* Kurtz, 1486.
 Allore *v.* Jewell, 1267.
 Almond *v.* Wilson, 1267.
 Almy *v.* Church, 1102.
 Alsberry *v.* Hawkins, 348.
 Alsop *v.* Catlett, 1266.
 Altemas *v.* Campbell, 1105.
 Althorp *v.* Wolfe, 475.
 Alvord *v.* Collins, 1545.
 Ambrouse *v.* Keller, 1453.
 Amcotts *v.* Catherich, 327.
 American Agricultural Chemical Co. *v.* Kennedy & Crawford, 1437.
 American Locomotive Co. *v.* Hoffman, 69, 70.
 American Net and Twine Co. *v.* Mayo, 1282, 1284, 1285.
 Ames *v.* Norman, 991.
 Ames *v.* San Diego, 1103.
 Amidon *v.* Harris, 115.
 Ammons *v.* Wolfe, 601.
 Amory *v.* Kannoffsky, 494.
 Amos *v.* Amos, 839.
 Ancaster *v.* Mayer, 719.
 Anderson *v.* Anderson, 1278.
 Anderson *v.* Brown, 924.
 Anderson *v.* Cary, 660, 661.
 Anderson *v.* Creston Land Co., 1224.
 Anderson *v.* Harvey, 1109.
 Anderson *v.* Hayes, 477.
 Anderson *v.* Mossy Creek Woolen Mills Co., 1282.
 Anderson *v.* Prindle, 432, 469.
 Anderson *v.* Railway Co., 66.
 Anderson *v.* Tompkins, 1195.
 Andr   *v.* Haseltine, 147.
 Andrews *v.* Brown, 26, 314.
 Andrews *v.* Button Co., 46.
 Andrews *v.* Senter, 646.
 Angle *v.* Marshall, 1197.
 Angus *v.* Dalton, 1143.
 Anthony *v.* Lapham, 66.
 Anthony *v.* Leftwich, 1427, 1428, 1430, 1435.
 Anthracite Sav. Bank *v.* Lees, 839.
 Antomarchi *v.* Russell, 134, 148.
 Antrobus *v.* Smith, 1450.
 Anworth *v.* Johnson, 526.
 App *v.* App, 830.
 Appling *v.* Eades, 1398.
 Archer's Case, 848, 854.
 Archer *v.* Helm, 1115.
 Archer *v.* Sadler, 1102.
 Ards *v.* Watkin, 494.
 Argenbright *v.* Campbell, 1423, 1593.
 Arglesse *v.* Muschamp, 615.
 Arkwright *v.* Gell, 157.
 Armistead *v.* Hartt, 592, 867.
 Armsby *v.* Woodward, 494.
 Armstead *v.* Hundley, 1269.
 Armstead *v.* Kirby, 718, 756.
 Armstrong's Foundry, 206.
 Armstrong *v.* Maybee, 502.
 Armstrong *v.* Risteau, 1104.
 Armstrong *v.* Snowden, 1500.
 Armstrong *v.* Stovall, 1201.
 Armstrong *v.* Wilson, 539.
 Arnold *v.* Arnold, 317.
 Arnold *v.* Brown, 222.
 Arnold *v.* Foot, 66.
 Arnold *v.* Hickman, 1161.
 Arnold *v.* Mundy, 72.
 Arnsby *v.* Woodward, 512.
 Artrip *v.* Rasnake, 679, 720.
 Asay *v.* Hoover, 1465, 1498.
 Ascough's Case, 419.
 Ash *v.* Abdy, 1418.
 Ash *v.* Way, 284, 1078, 1079.
 Asher Lumber Co. *v.* Cornett, 51.
 Ashley *v.* Ashley, 869.
 Ashnell *v.* Ayres, 1238.
 Astley *v.* Reynolds, 1162.
 Astor *v.* New York, 1547.
 Astor *v.* Wells, 1595.
 Astry *v.* Ballard, 526.

[References to pages]

- Atherton *v.* Pye, 868.
 Atkin *v.* Merrell, 414.
 Atkins *v.* Kron, 254.
 Atlanta Mills *v.* Mason, 139.
 Atlee *v.* Backhouse, 1162.
 Attorney General *v.* Doughty, 151.
 Attorney General *v.* Hall, 941.
 Attorney General *v.* Hubback, 26.
 Attorney General *v.* Merrimack
 Mfg. Co., 201, 662.
 Attorney General *v.* Proprietors,
 157.
 Attorney General *v.* Sutton, 219,
 873, 955.
 Attorney General *v.* Tarr, 1514.
 Attwater *v.* Attwater, 661.
 Atwater *v.* Bodfish, 118, 138.
 Atwater *v.* Buckingham, 376.
 Atwood *v.* Atwood, 320.
 Atwood *v.* Norton, 434.
 Atwood *v.* Shen. Val. R. Co., 1476,
 1494.
 Aubin *v.* Daly, 82.
 Augsburg Land & Improvement
 Co. *v.* Pepper, 1423, 1424, 1435,
 1436.
 Augusta Nat. Bank *v.* Beard, 676,
 1233, 1506.
 Augustus *v.* Seabolt, 864.
 Aulick *v.* Wallace, 887.
 Austerberry *v.* Oldham, 1217.
 Austin *v.* Austin, 410.
 Austin *v.* Hudson River R. Co.,
 527.
 Austin *v.* Minor, 1109.
 Austin *v.* Oakes, 1463.
 Austin *v.* Sawyer, 49.
 Austin *v.* Smith, 408.
 Austin *v.* Thompson, 456.
 Austin *v.* Trustees, 1158.
 Avelyn *v.* Ward, 920.
 Avery *v.* Clark, 759.
 Avery *v.* Dougherty, 482, 498, 1228.
 Avery *v.* Maxwell, 149.
 Ayres *v.* Reidel, 1114.
 Ayliffe *v.* Murray, 604, 752.
 Ayres *v.* Penn. R. Co., 1511.
 Ayres *v.* Robins, 760, 765.
 Babcock *v.* Kennedy, 707.
 Babcock *v.* Wyman, 683.
 Backenstoss *v.* Stahler, 49, 52.
 Bachelder *v.* Wakefield, 166.
 Backhouse *v.* Bonomi, 145.
 Backhouse *v.* Wells, 1, 92.
 Backus *v.* McCoy, 1219.
 Badger *v.* Badger, 1108.
 Bagot *v.* Bagot, 525.
 Bagwell *v.* Elliott, 1411.
 Bailey *v.* Carleton, 1120.
 Bailey *v.* Clay, 644.
 Bailey *v.* Duncan, 332.
 Bailey *v.* James, 1302, 1443.
 Bailey *v.* Kilburn, 479.
 Bailey *v.* Ogden, 1421.
 Bailey *v.* Robinson, 606, 607, 1182,
 1269.
 Bailey *v.* Stephens, 88.
 Baily *v.* Smith, 723.
 Bain *v.* Buff, 1166.
 Bainbridge *v.* Sherlock, 73.
 Baird *v.* Boucher, 1487.
 Bakeman *v.* Talbot, 1141.
 Baker *v.* Briggs, 1535.
 Baker *v.* Dening, 1380.
 Baker *v.* Fawcett, 703.
 Baker *v.* Hart, 93.
 Baker *v.* Jones, 647.
 Baker *v.* Jordan, 51.
 Baker *v.* Preston, 1567, 1575.
 Baker *v.* Rice, 129.
 Baldwin *v.* Baldwin, 1389, 1390.
 Baldwin *v.* Buffalo, 1513.
 Baldwin *v.* Merriam, 1542.
 Baldwin *v.* Timmins, 1221.
 Baldwin *v.* Walker, 101.
 Balfour *v.* Willand, 591.
 Ball *v.* Ball, 1071, 1074.

[References to pages]

- Ball *v.* Dunsterville, 1194, 1237.
 Ball *v.* Nye, 78, 475.
 Ball *v.* Payne, 232, 940, 957.
 Ball *v.* Taylor, 1237.
 Ballance *v.* Forsythe, 1526.
 Ballard *v.* Butler, 143.
 Ballard *v.* Child, 1229.
 Ballard *v.* Demmon, 1145.
 Ballard *v.* Dyson, 143.
 Ballard *v.* Tomlinson, 78.
 Ballard *v.* Walker, 1423.
 Ballentine *v.* Wood, 831.
 Baltimore *v.* Appold, 67.
 Baltimore *v.* Frick, 1512.
 Baltimore *v.* Warren Mfg. Co., 69.
 Baltimore Dental Ass'n *v.* Fuller, 468, 469.
 Baltimore & O. R. Co. *v.* Gould, 1514.
 Bancroft *v.* Wardwell, 459.
 Banghart *v.* Flummerfelt, 120.
 Bangs *v.* Parker, 137.
 Bangs *v.* Potter, 134.
 Bank of Alexandria *v.* Patton, 1272, 1282.
 Bank of Augusta *v.* Earle, 82.
 Bank of Commerce *v.* Owens, 374.
 Bank *v.* Crary, 51.
 Bank *v.* Wise, 53, 491.
 Bank of Marietta *v.* Pindall, 720.
 Bank of Metropolis *v.* Gutlick, 706, 715, 716.
 Bank of Montgomery County's Appeal, 702.
 Bank of Ogdensburgh *v.* Arnold, 335.
 Bank *v.* Trigg Co., 808, 810.
 Bank of State *v.* Forney, 660.
 Bank of U. S. *v.* Beirne, 481, 1484.
 Bank of U. S. *v.* Carrington, 565, 571, 572, 1234.
 Bank of U. S. *v.* Daniel, 1300.
 Bank of U. S. *v.* Winston, 789.
 Bank of Waltham *v.* Waltham, 29.
 Bank of Washington *v.* Arthur, 722.
 Banker's Loan & I. Co. *v.* Blair, 287, 781, 1560, 1580.
 Banks *v.* Banks, 1395.
 Banks *v.* Haskie, 428.
 Banks *v.* Poitiaux, 1173, 1181.
 Banks *v.* Sutton, 254, 419.
 Banks *v.* Whitehead, 1228.
 Bannon *v.* Angier, 136.
 Baptist Association *v.* Hart, 612, 1174, 1370, 1371.
 Barber *v.* Harris, 990.
 Barber *v.* Root, 284.
 Barbour *v.* Barbour, 264.
 Barclay *v.* Howell, 1108, 1129, 1514.
 Bard *v.* Elston, 434.
 Barden *v.* Keverberg, 1164.
 Barker *v.* Barker, 276, 326.
 Barker *v.* Blake, 1528.
 Barker *v.* Clark, 1142, 1144.
 Barkley *v.* Wilcox, 154, 155.
 Barksdale *v.* Barksdale, 1397.
 Barksdale *v.* Elam, 651.
 Barksdale *v.* Fitzgerald, 778.
 Barksdale *v.* Hairston, 165.
 Barley *v.* Byrd, 1575.
 Barlow *v.* Wainwright, 432, 467, 468.
 Barnard *v.* Bailey, 660.
 Barnard *v.* Edwards, 397.
 Barnard *v.* Whipple, 157.
 Barnes *v.* Boardman, 1527.
 Barnes *v.* Crow, 1405.
 Barnes *v.* Lloyd, 117.
 Barnes *v.* Morrison, 1441.
 Barnes *v.* Wood, 377.
 Barnett *v.* Gaines, 1223.
 Barney *v.* Frowner, 406.
 Barney *v.* Keokuk, 71, 72.
 Barns *v.* Wilson, 498.
 Barnum *v.* Barnum, 254, 875, 928.
 Barnum *v.* Phenix, 723.
 Barr *v.* White, 778, 779.

[References to pages]

- Barre v. Fleming*, 73, 1224.
Barrell v. Sabine, 686.
Barrett v. Boddie, 508.
Barrett v. Failing, 264.
Barrett v. Hinckley, 720.
Barrett v. Ice Co., 78.
Barrie v. Smith, 645, 659, 668.
Barrington v. Tristram, 221.
Barron v. Richard, 629.
Barrow v. Landry, 154.
Barry v. Edlavitch, 132, 147.
Barthell v. Peter, 1194.
Bartholomew v. Leech, 1531.
Barton v. Brent, 1571.
Barton v. Ridgeway, 599.
Barwick's Case, 266.
Barwick v. Thompson, 1099.
Bashaw v. Wallace, 1307.
Baskett v. Sellars, 1203.
Bass v. Scott, 564.
Bassett v. Bradley, 728.
Bassett v. Maynard, 164.
Bassett v. Nosworthy, 585, 736, 737, 1262, 1582.
Bassett v. Salisbury Mfg. Co., 154.
Batchelder v. Dean, 427, 428, 440.
Batchelder v. Keniston, 1090.
Batchelor v. Brereton, 1201.
Bates v. Ball, 1161.
Bates v. Bates, 317, 323.
Bates v. Boston & R. Co., 1237.
Bates v. Holman, 1396, 1397.
Bates v. Norcross, 392.
Batterman v. Albright, 49, 52.
Battin v. Woods, 1531.
Batting v. Martin, 466.
Baugh v. Wilkins, 482, 498, 499.
Bauman v. Boeckeler, 1512.
Baxwell v. Christie, 1441.
Bay v. Williams, 727.
Bayard v. Hargrove, 1514.
Baylor v. B. & O. R. Co., 149, 150.
Baylor v. Dejarnette, 596.
Beach v. Crain, 502.
Beal v. Boston Car Spring Co., 486.
Beale v. Seively, 1240.
Beaman v. Russell, 1308.
Beane v. Yerby, 1387, 1388.
Beard v. Beard, 387.
Beard v. Murphy, 146, 155.
Beard v. Nuthall, 386, 1450.
Beardslee v. Beardslee, 322.
Beardsley v. Hotchkiss, 1465.
Bearpark v. Hutchinson, 241, 1085, 1086.
Beatty v. Clark, 1494.
Beatty v. Kurtz, 1510.
Beaty v. Beaty, 1381.
Beaty v. Bordwell, 1002.
Beauclerk v. Dormer, 939.
Beaupland v. McKeen, 1509.
Beavans v. Biscoe, 54.
Beavers v. Smith, 414.
Becar v. Flues, 434.
Beck's Appeal, 1462.
Becker v. Howard, 1544.
Beckett v. Cordley, 738.
Beckford v. Parnecott, 1405.
Beckford v. Wade, 1132.
Becks v. DeBaptist, 736.
Beckwith v. Butler, 1022.
Beckwith v. Howard, 435.
Bedford v. Terhune, 509.
Bedford v. Willard, 1103.
Beecher v. Wilson, 572.
Beeson v. Burton, 455.
Belcher v. Belcher, 1473.
Bell v. American Protective League, 513.
Bell v. Ellis, 459.
Bell v. Gillespie, 219, 939, 956, 963.
Bell v. Jones, 1402.
Bell v. McClintock, 70.
Bell v. Mayor, 254.
Bell v. Nealy, 360.
Bell v. Ohio & R. Co., 95.
Bellasis v. Hester, 441.

[References to pages]

- Bellefontaine Improvement Co. *v.* Niedringhaus, 1090, 1092.
 Beller *v.* Robinson, 428.
 Bellis *v.* Bellis, 1111.
 Bender *v.* Dregan, 1542.
 Bender *v.* George, 513.
 Bender *v.* Luckenbach, 570.
 Benedict *v.* Benedict, 166.
 Benedict *v.* Morse, 461.
 Benham *v.* Potter, 1514.
 Benjamin *v.* Madden, 1288.
 Benjamin *v.* Wilson, 434.
 Bennet *v.* Davis, 279.
 Bennett *v.* Gaddis, 1393.
 Bennett *v.* Garlock, 198.
 Bennett *v.* Reeve, 89, 90.
 Bennett *v.* Toler, 1077, 1079.
 Bennett *v.* Trustees, 251.
 Benson *v.* Chester, 90.
 Benson *v.* Humphrey, 1445, 1446, 1447.
 Bentley *v.* Harris, 1283.
 Bentley *v.* Root, 140.
 Benton *v.* Crowell, 1187.
 Benton *v.* Johncox, 66.
 Bergman *v.* Roberts, 480.
 Berkeley *v.* Hardy, 1194.
 Berlin *v.* Melhorn, 714.
 Berry *v.* Fishburne, 1258, 1445, 1446, 1447.
 Berry *v.* Mut. Ins. Co., 735, 738.
 Berry *v.* Wade, 375.
 Berry *v.* Wortham, 1435.
 Berry *v.* Young, 1240.
 Best *v.* Jenks, 395.
 Beune *v.* Miller, 1090.
 Bevans *v.* Briscoe, 58.
 Beverley *v.* Beverley, 835.
 Beverley *v.* Brooke, 585, 676, 1585, 1588, 1591, 1594.
 Beverley's Case, 1155, 1159.
 Beverley *v.* Ellis, 1564, 1566.
 Beverley *v.* Miller, 604.
 Beverley *v.* Walden, 1155.
 Bewick *v.* Fletcher, 38.
 Bewick *v.* Whitfield, 535.
 Bibb *v.* Thomas, 1398.
 Bicknell *v.* Comstock, 1099.
 Biedler *v.* Biedler, 1019, 1373.
 Bierne *v.* Erskine, 1303, 1446.
 Bigelow *v.* Hubbard, 1223.
 Bigelow *v.* Shaw, 78.
 Biggs *v.* Brown, 59.
 Biggs *v.* Elliston Development Co., 761, 763.
 Bigley *v.* Watson, 829.
 Bilderback *v.* Boyce, 1488.
 Billan *v.* Hucklebroth, 264.
 Billings *v.* Taylor, 340, 525.
 Bince *v.* Bissell, 831.
 Bing *v.* Burroughs, 201, 942, 1474.
 Bingham's Appeal, 1487.
 Bingham *v.* Bingham, 1301.
 Bingham's Case, 841.
 Binkley *v.* Forkner, 36, 37.
 Binley *v.* Garvin, 163.
 Birch *v.* Linton, 1157, 1158.
 Birch *v.* Wright, 707.
 Bird *v.* Gardner, 336.
 Birmingham *v.* Allen, 144.
 Birmingham *v.* Anderson, 1253.
 Birmingham *v.* Kirwan, 391.
 Birnie *v.* Main, 731.
 Bishop of Baths' Case, 427.
 Bishop of Winchester *v.* Knight, 535.
 Bishop *v.* Bishop, 45.
 Bishop *v.* Remple, 1487.
 Bishop *v.* Truett, 1105.
 Bisquay *v.* Jeunelot, 148.
 Bittinger *v.* Baker, 62.
 Bittison *v.* Budd, 481.
 Black *v.* Gilmore, 435, 498, 1206.
 Black *v.* O'Hara, 1146.
 Blackburn *v.* Stables, 854.
 Blackhouse *v.* Jett, 1281.
 Blackmore *v.* Boardman, 425.
 Blagden *v.* Bradbear, 1433, 1434.

[References to pages]

- Blair *v.* Osborne, 1203.
 Blair *v.* Owles, 1591, 1595.
 Blair *v.* Snodgrass, 571.
 Blair *v.* Security Bank of Richmond, 1245, 1246, 1247.
 Blair *v.* Thompson, 312, 390, 414.
 Blaisdell *v.* Morse, 1201.
 Blaisdell *v.* Portsmouth, etc., 164.
 Blake's Case, 726.
 Blake *v.* Everett, 1223.
 Blake *v.* Howe, 1530, 1531.
 Blake *v.* Sanderson, 480.
 Blakewell *v.* Ogden, 1498.
 Blanchard *v.* Baker, 68.
 Blanchard *v.* Blanchard, 830.
 Blanchard *v.* Brooks, 706, 892, 1507.
 Blantire *v.* Whitaker, 480.
 Blanton *v.* Taylor, 1298.
 Bleecker *v.* Smith, 647.
 Blessing *v.* Beatty, 1302, 1304, 1446, 1447.
 Blevins *v.* Smith, 347.
 Bligh *v.* Brent, 29.
 Bliss *v.* Johnson, 1104.
 Bliss *v.* Whitney, 38.
 Block *v.* Isham, 147.
 Blondeau *v.* Sheridan, 1229.
 Bloodworth *v.* Stevens, 491.
 Bloomer *v.* Waldron, 1465.
 Blore *v.* Sutton, 1496.
 Blount *v.* Harvey, 1217.
 Blow *v.* Maynard, 316, 318, 372, 1281, 1298.
 Blumenberg *v.* Myers, 464.
 Blunt *v.* Gee, 1050, 1076.
 Blyth *v.* Dennett, 470.
 Board of Education *v.* Edson, 1510.
 Board of Education *v.* Inhabitants, etc., 1514.
 Board of Education *v.* Martin, 1103.
 Board of Regents, etc., *v.* Painter, 1510.
 Board of Supervisors of Bedford Co. *v.* Bedford High School, 208.
 Board of Trustees *v.* Blair, 503.
 Board of Works *v.* United Telephone Co., 23.
 Board *v.* Wilson, 760.
 Boardman *v.* Lessees of Reed, 1251.
 Boatman *v.* Lasley, 115.
 Bodfish *v.* Bodfish, 1142.
 Bodine *v.* Arthur, 1203.
 Boggett *v.* Frier, 1163.
 Boggs *v.* Mining Co., 63.
 Bohannon *v.* Combs, 372.
 Bohannon *v.* Lewis, 1239.
 Boisseau *v.* Fuller, 444.
 Bolivar Mfg. Co. *v.* Neponset Mfg. Co., 67, 1146.
 Bolling *v.* Bolling, 382, 383.
 Bolling *v.* Petersburg, City of, 208.
 Bolling *v.* Teel, 1013, 1027, 1037, 1324, 1575.
 Bolton *v.* Bishop of Carlisle, 1309, 1310.
 Bolton *v.* Bolton, 1282.
 Boltz *v.* Stolz, 396.
 Bombaugh *v.* Miller, 136.
 Bonafous *v.* Rybot, 669.
 Bond *v.* Godsey, 256, 340, 342, 343.
 Bond *v.* Pettit, 1518, 1533, 1536, 1540.
 Bond *v.* Willis, 124, 125.
 Bone *v.* Tyrrell, 256.
 Bonelli *v.* Blakemore, 120.
 Bonewits *v.* Wygant, 1091.
 Bonner *v.* De Loach, 149.
 Bonner *v.* Peterson, 409.
 Bonomi *v.* Backhouse, 145.
 Boody *v.* Davis, 1242.
 Bool *v.* Mix, 1157, 1158.
 Boon *v.* Simmons, 1518, 1524.
 Boone *v.* Moore, 1202.
 Booraem *v.* Railway, 1513.
 Booraem *v.* Wells, 1489.
 Booth *v.* Com., 1014.
 Booth *v.* Starr, 1230.
 Borah *v.* Archer, 1032.

[References to pages]

- Boraston's Case, 427, 828, 829, 833, 834, 837.
 Boreel v. Lawton, 482, 499, 508.
 Borland v. Marshall, 268, 269.
 Borst v. Corry, 706, 716.
 Borst v. Empie, 123.
 Borst v. Nalle, 565, 772, 774, 778, 779, 780.
 Boschens v. Jurgens, 1445, 1446.
 Bostick v. Winston, 1497.
 Boston v. Chesapeake & O. R. Co., 796, 797, 800.
 Boston v. Richardson, 1256.
 Boston, etc., R. Co. v. Salem, etc., R. Co., 85.
 Boston & P. R. Corp. v. Doherty, 140, 161, 168.
 Boston Water Co. v. Railway Co., 84, 85, 118.
 Bostwick v. Williams, 1228.
 Boswell v. Goodwin, 701.
 Boughton v. Boughton, 384.
 Boutelle v. Bank, 1480.
 Bouvier v. Stricklett, 1091.
 Boveel v. Hinde, 1241.
 Bovey v. Smith, 1465.
 Bowden v. Johnson, 1285.
 Bowden v. Parrish, 1571.
 Bowe v. Hunking, 477.
 Bowen v. Beck, 727.
 Bowen v. Bowen, 628, 1474.
 Bowen v. Collins, 332.
 Bowen v. Conner, 123.
 Bowen v. Guild, 1105.
 Bowen v. Team, 140.
 Bowers v. Bowers, 51, 1571.
 Bowers v. Williams, 1536.
 Bowie v. Poor Schools Soc., 1103.
 Bowles' Case, 192, 325, 534, 848, 853, 1001.
 Bowles v. Poore, 1085.
 Bowles v. Woodson, 1422.
 Bowling v. Crook, 646.
 Bowling v. Dobyn, 910.
 Bowlsby v. Speer, 155.
 Bowman v. Robb, 1239.
 Bowman v. Wolford, 1430.
 Bowne v. Lynde, 729.
 Boxheimer v. Gunn, 1588.
 Boyd's Estate In re, 1472.
 Boyd v. Boyd, 604, 1481.
 Boyd v. Carlton, 406, 412.
 Boyd v. Conklin, 155.
 Boyd v. Cook, 1389, 1397, 1398.
 Boyd v. Eby, 1367.
 Boyd v. Hunter, 315, 323, 420.
 Boyd v. Magruder, 1436.
 Boyd v. Slayback, 1242.
 Boydell v. Drummond, 1422.
 Boyden v. Moore, 1528.
 Boyers v. Newbanks, 409.
 Boykin v. Ancrum, 251.
 Boyle v. Peabody, 425.
 Boyle v. Tamlyn, 149.
 Boynton v. Boynton, 391.
 Bozeman v. Browning, 1158.
 Brace v. Duchess of Marlborough, 737.
 Brackett v. Persons Unknown, 342.
 Bradford v. Bradford, 1413.
 Bradford v. Foley, 885.
 Bradford v. Griffin, 251.
 Bradford v. Monks, 1480, 1482.
 Bradford v. Pickles, 77.
 Bradley v. Bailey, 54.
 Bradley v. Fuller, 706.
 Bradley v. Holdsworth, 29.
 Bradley v. Mosby, 916.
 Bradley v. Westcott, 942.
 Bradley v. Zehmer, 1028.
 Bradley's Fish Co., 1143.
 Bradley's Salt Co. v. Norfolk Importing & Exporting Co., 1247.
 Bradshaw v. Outram, 756.
 Bradstreet v. Clark, 641.
 Braicbridge v. Cook, 899.
 Braman v. Bingham, 1241.
 Bramble v. Billups, 232, 956, 957.

[References to pages]

- Bramley *v.* Alb, 1441.
 Branch *v.* Bowman, 238, 327, 1164.
 Branch *v.* Doane, 1140.
 Brandon *v.* Old, 1160, 1161.
 Brandon *v.* Robinson, 665, 666, 667.
 Brann *v.* Monroe, 1242.
 Brant *v.* Va. Coal, etc., Co., 201,
 237, 244, 942, 1508.
 Branton *v.* Griffiths, 53.
 Brattle Square Church *v.* Grant,
 933.
 Brawley *v.* Catron, 759.
 Braxton *v.* Bell, 1432.
 Braxton *v.* Coleman, 406.
 Braxton *v.* Reed, 1533.
 Bray *v.* Bree, 1472.
 Bream *v.* Cooper, 631.
 Breckenridge *v.* Auld, 690, 698, 736.
 Bredon's Case, 451, 899.
 Breeding *v.* Davis, 284, 285, 286,
 287.
 Breeden *v.* Peale, 793, 794, 1275,
 1285, 1288, 1290, 1299.
 Brennan *v.* Whitaker, 37, 44, 46.
 Brent *v.* Chapman, 1099.
 Brent *v.* Green, 1422, 1424, 1425,
 1434.
 Brent *v.* Washington, 221, 829.
 Bresee *v.* Bradfield, 597, 598.
 Brett *v.* Donaghe's Guardian, 192.
 Brewer *v.* Conover, 459.
 Brewer *v.* Herbert, 25.
 Brewer *v.* Van Arsdale, 333.
 Brewis *v.* Lawson, 897.
 Brewster *v.* Kidgile, 1217.
 Brewster *v.* Kitchin, 1217.
 Brice *v.* Randall, 125.
 Brice *v.* Stokes, 604.
 Bridges *v.* Purcell, 167.
 Bridgewater *v.* Bolton, 192.
 Bridgewater Roller Mills Co. *v.*
 Strough, 730, 731, 732, 1586, 1592.
 Brien *v.* O'Shaughnesy, 1527.
 Brien *v.* Pittman, 766.
 Briggs *v.* Hall, 111, 499, 501.
 Bright *v.* Knight, 566, 572.
 Bright *v.* Walker, 138.
 Brinckmeyer *v.* Browneller, 701.
 Brinkley *v.* Hambleton, 513.
 Briscoe *v.* Ashby, 588.
 Briscoe *v.* Clarke, 1284.
 Bristol Iron & Steel Co. *v.* Cald-
 well, 780.
 Bristol Iron & Steel Co. *v.*
 Thomas, 763, 796, 808.
 Bristow *v.* Boothby, 1471.
 Britton *v.* Thornton, 937.
 Broadbent *v.* Ramsbotham, 76,
 154, 1147.
 Broadbudd *v.* Turner, 867, 939, 956,
 963.
 Broadbudd *v.* Rosson, 591, 722.
 Broadhurst *v.* Morris, 968.
 Broadway Nat. Bank *v.* Adams,
 666.
 Brock *v.* Bear, 181, 1113, 1114.
 Brock *v.* Rice, 714.
 Brockenbrough *v.* Ward, 644.
 Brockenbroughs *v.* Brock-
 enbroughs, 53, 775, 776.
 Broderick *v.* Broderick, 1266.
 Brograve *v.* Winder, 1386.
 Bromfield *v.* Crowder, 830, 832,
 910.
 Bronson *v.* Coffin, 147.
 Bronson *v.* Lumber Co., 1547.
 Brooke *v.* Croxton, 867, 960.
 Brooke *v.* Meruagh, 521, 522.
 Brooke *v.* Schacklett, 612, 613,
 1370, 1371.
 Brooke *v.* Turner, 1540.
 Brooke *v.* Washington, 26, 314, 573.
 Brookfield *v.* Williams, 1032.
 Brooks *v.* Curtis, 132, 147.
 Brooks *v.* Everett, 317.
 Brooks *v.* Reynolds, 152.
 Brookville Hydraulic Co. *v.* But-
 ler, 78.

[References to pages]

- Broom v. Hore*, 494.
Brossart v. Corlett, 137, 138.
Brothers v. Hurdle, 55.
Brough v. Higgins, 252, 253.
Broughton v. Pensacola, 1041.
Broughton v. Randall, 310.
Brown v. Allen, 122.
Brown v. Armistead, 1300, 1482.
Brown v. Baldwin, 36.
Brown v. Banner Coal & Coal Oil Co., 1331.
Brown v. Beavor, 1381.
Brown v. Bowen, 70, 1509.
Brown v. Brown, 574, 932.
Brown v. Chadbourne, 71, 74.
Brown v. Chicago, B. & K. C. Ry. Co., 1111.
Brown v. George, 941.
Brown v. Goodwin, 1545.
Brown v. Higgs, 1410, 1476, 1477, 1479, 1490.
Brown v. McGowan, 439.
Brown v. Molineaux, 1276.
Brown v. Morris, 63.
Brown v. Parsons, 428.
Brown v. Renshaw, 1500.
Brown v. Rice, 1268, 1301.
Brown v. Robins, 146.
Brown v. Simons, 700.
Brown v. Spilman, 78, 79, 93.
Brown v. Stone, 143.
Brown v. Thorndike, 1395.
Brown v. Thurston, 49, 52, 54.
Brown v. Westerfield, 1240, 1242.
Brown's Trust In re, 1492.
Browne v. Bockover, 282, 286.
Browne v. Molliston, 1365.
Browne v. Turberville, 1066, 1067, 1069, 1073.
Brownell v. Curtis, 1277.
Browning v. Headley, 1298.
Browns v. Strother, 201, 202, 237, 244, 942, 1474.
Brownson v. Hull, 989.
Bruce v. Slemp, 1020.
Bruce v. Taylor, 74.
Bruerton's Case, 494.
Brumagim v. Bradshaw, 1108.
Brummell v. Harris, 1115.
Brummell v. Macpherson, 645, 664.
Brunson v. Brooks, 1596.
Brunton v. Hale, 1141.
Brush v. Ware, 1594.
Bryan v. Hyre, 1373.
Bryan v. Ramirez, 1508.
Bryan v. Stump, 751, 753, 1013, 1196, 1324.
Buchanan v. Clark, 729, 785.
Buchanan v. King, 975, 976, 978, 1009.
Buchanan v. Reynolds, 1542.
Buck v. Buck, 570.
Buck v. Hill, 1224.
Buck v. Pickwell, 52.
Buck v. Ward, 1264.
Buck v. Winn, 314.
Buckeridge v. Glasse, 575.
Buckle v. Lafferty, 577, 605, 607, 1182, 1269.
Buckley v. Barber, 982.
Buckley v. Kenyon, 100.
Buckmaster v. Harrop, 1425, 1428.
Buckner v. Mackay, 1239.
Buckout v. Swift, 45.
Buckworth v. Thirkell, 293.
Budd v. Hiler, 49.
Buell v. Cook, 445.
Buffalo, etc., Cemetery v. Buffalo, 158.
Buffalo, etc., R. Co. v. Stigeler, 1255.
Buffar v. Bradford, 221, 968.
Buford v. McKee, 1294.
Buford v. North Roanoke Land & Imp. Co., 839.
Bugg v. Seay, 581, 1262, 1588.
Buggett v. Meux, 661.
Building, Light & Water Co. v.

[References to pages]

- Fray, 311, 368, 1169, 1180, 1219,
 1220, 1221, 1225, 1229, 1231, 1249,
 1560.
 Bull *v.* Kingston, 941.
 Bull *v.* Kirk, 1547.
 Bull *v.* Ky. Nat. Bank, 667.
 Bull *v.* Read, 1516.
 Bullard *v.* Barksdale, 1102.
 Bullard *v.* Bowers, 335.
 Bullard *v.* Harrison, 125.
 Bullock *v.* Dommitt, 502.
 Bullock *v.* Downes, 832, 838.
 Bullock *v.* Stone, 950.
 Bullock *v.* Wilson, 71.
 Bulwer *v.* Bulwer, 56.
 Bumgardner *v.* Allen, 703.
 Bumgardner *v.* Harris, 1283, 1291,
 1293, 1294, 1295.
 Buntin *v.* Danville, City of, 1510,
 1511.
 Burbank *v.* Whitney, 921.
 Burbridge *v.* Higgins, 773, 778,
 1278.
 Burch *v.* Smith, 1267.
 Burdeck *v.* Cheadle, 474.
 Burdick *v.* Bingham, 1549.
 Burdine *v.* Burdine, 309, 310, 1416.
 Burdis *v.* Burdis, 623, 624, 647.
 Burger *v.* Grief, 729.
 Burgess *v.* Lamb, 527, 528.
 Burgh *v.* Francis, 1583.
 Burghardt *v.* Turner, 1118.
 Burgner *v.* Humprey, 145.
 Burhaus *v.* Hutcheson, 723.
 Burke *v.* Shaver, 652.
 Burkholder *v.* Ludlam, 1432.
 Burke's Appeal, 377.
 Burleigh *v.* Piper, 53.
 Burley's Case, 854.
 Burling *v.* Read, 463.
 Burly *v.* Garvin, 168.
 Burnell *v.* Maloney, 1113.
 Burnett *v.* Burnett, 338.
 Burnett *v.* Hawpes, 1166, 1168.
 Burnett *v.* Thompson, 452.
 Burnette *v.* Young, 1238.
 Burnham *v.* McQuēsten, 1145.
 Burnham *v.* Webster, 72.
 Burns *v.* Burns, 1194.
 Burns *v.* McCubbin, 1504.
 Burns *v.* Phelps, 507.
 Burr *v.* Beers, 727.
 Burr *v.* Stenton, 435, 498.
 Burrell's Case, 1282.
 Burroughs *v.* Goff, 1528.
 Burroughs *v.* Saterlee, 76.
 Burrows *v.* Gallup, 1105, 1111.
 Burrus *v.* Wilkinson, 1228.
 Burruss *v.* Hines, 434.
 Burtinshaw *v.* Gilbert, 1406.
 Burtner *v.* Keran, 1210, 1233, 1504,
 1505, 1506.
 Burton *v.* Burton, 348, 1195.
 Burton *v.* Scott, 1363.
 Burton *v.* Smith, 517.
 Burwell *v.* Burwell, 500.
 Burwell *v.* Fauber, 584, 1594.
 Burwell *v.* Hobson, 68, 70, 129.
 Burwell *v.* Lumsden, 389, 1298.
 Bush *v.* Davidson, 1525.
 Bushfield *v.* Meyer, 724.
 Bushman *v.* Wilson, 496.
 Bustard's Case, 320.
 Butcher *v.* Butcher, 463, 1464.
 Butcher *v.* Creel, 122.
 Butcher *v.* Stapeley, 1593.
 Butler *v.* Gazzam, 1465.
 Butler *v.* Palmer, 1539.
 Butler *v.* Peck, 154, 155.
 Butler *v.* U. S., 1194.
 Butler's *v.* Baker's Case, 1192,
 1246, 1374.
 Butt *v.* Ellett, 486.
 Butt *v.* Imperial Gas Co., 151.
 Butterfield *v.* Ried, 136, 140.
 Butternuth *v.* Bridge Co., 1091.
 Buttes *v.* Nunan, 991.
 Buxton *v.* Lister, 1435.

[References to pages]

- Buzby's Appeal, 838.
 Byassee v. Reese, 52.
 Byers v. Locke, 1262.
 Byington v. Buckwalter, 1536.

 Cabell v. Puryear, 1023.
 Cabell v. Vaughan, 1344.
 Cadaval v. Collins, 1162.
 Cadell v. Palmer, 927, 928, 929.
 Cadogan v. Kennett, 1274.
 Cadwalader v. Bailey, 85, 115, 116, 117.
 Cagle v. Parker, 120.
 Cahill v. Palmer, 1111.
 Caldwell v. Craig, 1446, 1447.
 Caldwell v. Fulton, 63, 64, 92.
 Caldwell v. Jacobs, 252.
 Caldwell v. Slade, 474.
 Cales v. Miller, 1570.
 Caleava v. Pope, 938.
 Calhoun v. Jones, 1367.
 Callanan v. Hurley, 1548, 1549.
 Callen v. Hilty, 161.
 Callis v. Kemp, 939, 940, 951, 978.
 Calmady v. Calmady, 1036.
 Calvert v. Aldrich, 1002.
 Calvert v. Rice, 341, 523.
 Calvin v. Fraser, 1399.
 Calvo v. Davies, 727.
 Cambridge v. Rous, 1410.
 Camden, etc., Ass'n v. Jones, 390.
 Cammack v. Soran, 793, 1280, 1283.
 Camp v. Cleary, 660, 665.
 Campbell v. Campbell, 601.
 Campbell v. French, 1399.
 Campbell v. Holt, 1099.
 Campbell v. Leach, 1493.
 Campbell v. McBee, 286.
 Campbell v. Murphy, 405.
 Campbell v. Roddy, 36, 37.
 Campbell v. Sandys, 884.
 Campbell v. Smith, 727.
 Campbell v. Wallace, 1105.
 Campbell v. Watkins, 1227.

 Campbell v. Wilcox, 1200.
 Campbell v. Wilson, 152.
 Canfield v. Andrew, 68.
 Canfield v. Clark, 1114.
 Cannavan v. Conkling, 474.
 Cannon v. Barry, 523.
 Cannon v. Nowell, 1067.
 Canny v. Andrews, 136, 137.
 Capron v. Greenway, 118, 138.
 Carbrey v. Willis, 156.
 Cardigan v. Atmitage, 87.
 Cardwell v. Kelly, 1263, 1276.
 Care v. Keller, 397.
 Cargill v. Power, 1539.
 Carleton v. Redington, 167.
 Carlin v. Chappel, 145.
 Carlin v. Paul, 133.
 Carlisle v. Cooper, 132, 1146.
 Carlton v. Blake, 132.
 Carlton v. Iron Co., 475.
 Carnall v. Wilson, 395, 396, 398, 399.
 Carneal v. Lynch, 313, 414, 890, 995, 1011, 1028.
 Carney v. Kain, 198, 1498.
 Carney v. Mosher, 60.
 Carpenter v. Allen, 36.
 Carpenter v. Garrett, 177, 266, 268, 270.
 Carpenter v. Gold, 65, 67, 69.
 Carpenter v. Koons, 728.
 Carpenter v. Longan, 720, 723.
 Carpenter v. Snellings, 1200.
 Carpenter v. Walker, 33.
 Carper v. McDowell, 1566, 1572.
 Carper v. Marshall, 679, 762.
 Carr v. Carr, 305.
 Carr v. Givens, 66, 269, 270.
 Carr v. Williams, 376.
 Carrington v. Didier, 794.
 Carrington v. Goddin, 631, 901, 1250, 1483.
 Carrol v. Blencon, 238, 1163.
 Carson v. Carson, 1478.

[References to pages]

- Carson *v.* Godley, 473.
 Carter *v.* Allan, 676, 1585, 1591.
 Carter *v.* Campbell, 1446.
 Carter *v.* Chandron, 1237.
 Carter *v.* Chevalier, 1120.
 Carter *v.* Dale, 279.
 Carter *v.* Denman, 1223, 1229.
 Carter *v.* Goodin, 338, 402.
 Carter *v.* Hagan, 1119.
 Carter *v.* Harris, 605.
 Carter *v.* McArtor, 1301.
 Carter *v.* Robinette, 1575.
 Carter *v.* Tyler, 956, 961.
 Carter *v.* Wood, 1575.
 Carruthers *v.* Eldridge, 1248.
 Cartwright *v.* Maplesden, 140, 161, 168.
 Caruthers *v.* Hall, 728.
 Cary *v.* Daniels, 67.
 Case *v.* Hoffman, 154.
 Case Mfg. Co. *v.* Garven, 39.
 Casebeer *v.* Mowry, 70.
 Casey *v.* Gregory, 481.
 Cass *v.* Thompson, 344.
 Cassilly *v.* Rhodes, 62.
 Casson *v.* Dade, 1390.
 Casterton *v.* Sutherland, 1478, 1491.
 Castleman *v.* Vietch, 1027.
 Castner *v.* Riegal, 147.
 Catlin *v.* Ware, 404, 405, 406.
 Catt *v.* Wm. Knabe & Co. Mfg. Co., 1288.
 Cattlin *v.* Brown, 932, 936.
 Cazassa *v.* Cazassa, 1242.
 Central Bridge Co. *v.* Lowell, 84, 85.
 Central Land Co., of Buchanan *v.* Johnston, 1423, 1438.
 Central Wharf, etc., Corp. *v.* Proprietors of India Wharf, 134.
 Chadeayne *v.* Robinson, 155.
 Chadleigh's Case, 841.
 Chadock *v.* Cowley, 867, 868.
 Chaffee *v.* Atlas Lumber Co., 337.
 Chamberlain *In re*, 49, 52.
 Chamberlaine *v.* Marsh, 1301, 1303.
 Chamberlayne *v.* Dummer, 528.
 Chamberlayne *v.* Temple, 1276, 1278, 1280.
 Chambers *v.* Pleak, 481.
 Champaign *v.* Harmon, 1532.
 Champlin *v.* Champlin, 350.
 Chance *v.* Branch, 1114.
 Chance *v.* McWhorter, 1588.
 Chandler *v.* Cheney, 992.
 Chandler *v.* Moulton, 1531.
 Chandler *v.* Rushing, 1120.
 Chandler *v.* Simmons, 1158.
 Chanet *v.* Villeponteaux, 1483.
 Chaney *v.* Chaney, 337.
 Chapin *v.* Brown, 133.
 Chapin *v.* Crow, 136.
 Chapman *v.* Bennett, 1518, 1529.
 Chapman *v.* Bluck, 445.
 Chapman *v.* Chapman, 309, 310, 831, 975, 1110, 1117, 1595.
 Chapman *v.* Com., 742.
 Chapman *v.* Emery, 1283.
 Chapman *v.* Floyd, 1510.
 Chapman *v.* Holmes, 1229.
 Chapman *v.* Price, 279, 280, 281.
 Chapman *v.* Sims, 1332.
 Chapman *v.* Turner, 688.
 Chappell *v.* New York & N. H. R. Co., 123, 1204.
 Chappell *v.* Trent, 1364, 1367, 1369, 1380, 1389.
 Charles *v.* Charles, 1166.
 Charles *v.* Hunnicutt, 1174, 1372.
 Charles River Bridge Co. *v.* Warren Bridge Co., 86.
 Charless *v.* Rankin, 144, 146.
 Charlton *v.* Gardner, 1288.
 Chaltiers Block Coal Co. *v.* Melton, 79, 93.
 Chase's Case, 317, 363, 413.
 Chase *v.* Box Co., 37.
 Chase *v.* Gowdy, 1498.

[References to pages]

- Chase v. Silverstone*, 77.
Chase v. Walker, 1215.
Chase v. Weston, 1230.
Chase v. Wingate, 42.
Chasemore v. Richards, 76, 77, 154, 1147.
Chastey v. Ackland, 152.
Chatfield v. Wilson, 77.
Cheatham v. Gower, 830, 840, 911.
Cheatham v. Hatcher, 1383, 1387, 1388, 1390.
Check v. Aurora, 1102.
Cheeseborough v. Green, 31.
Cheetham v. Hampson, 472.
Cheever v. Pearson, 455. •
Chesapeake & O. R. Co. v. Walker, 74, 1089, 1173, 1181, 1508.
Chesley v. King, 77, 151.
Chester Emery Co. v. Lucas, 63.
Chesterfield v. Janssen, 1271, 1273.
Chesterman v. Bolling, 1575.
Chestnut v. Tyson, 1228.
Chetham v. Williamson, 34.
Chew's Appeal, 1413.
Chew v. Commissioners, 269.
Chew v. Keller, 829, 831, 888.
Chicago v. Railway Co., 1511.
Chicago v. Middlebrooke, 1103.
Chicago & N. W. Ry. Co. v. Hoag, 1143.
Child v. Chappell, 133.
Childers v. Smith, 312.
Chinn v. Murray, 1010, 1016, 1022.
Chipman v. Palmer, 69.
Cholmley's Case, 875, 877.
Cholmondeley v. Clinton, 696, 884.
Cholmondeley v. Meyrick, 884.
Chowning v. Cox, 689, 690, 747, 748, 756.
Christian v. Cabell, 25, 1443.
Christian v. Coleman, 1021, 1022.
Christian v. Dripps, 39.
Christy v. Minor, 1518, 1545.
Christy v. Pulliam, 1485.
- Chrysty v. Spring Valley Water Works*, 1118.
Church v. Church, 337.
Church v. Gilmar, 1240.
Church v. Wells, 157, 158.
Churchhill v. Dibben, 1167.
Churchill v. Reamer, 273.
Cincinnati v. Penny, 145.
Cincinnati v. White, 1510.
Cirode v. Buchanan, 792, 794.
City of London v. Greyme, 52.
Claffin v. Boston & Albany R. Co., 123, 1204.
Claiborne v. Henderson, 329, 332.
Clanton v. Estes, 290.
Clap v. Draper, 49.
Clarendon v. Hornby, 1033.
Clark v. Banks, 59.
Clark v. Chamberlain, 1249.
Clark v. Cogge, 130.
Clark v. Debaugh, 129.
Clark v. Harvey, 54.
Clark v. Hill, 38.
Clark v. Hulsey, 1115.
Clark v. Hutzler, 1251, 1257, 1579, 1592.
Clark v. McGee, 1215.
Clark v. Martin, 1215.
Clark v. Middlesworth, 1474.
Clark v. Munroe, 311.
Clark v. Parsons, 1509.
Clark v. Roller, 1250, 1257.
Clark v. Sevier, 377.
Clark v. Swift, 1229.
Clark v. Ward, 792.
Clark v. Wheelock, 456, 460.
Clarke v. Clarke, 264.
Clarke v. Courtney, 1195.
Clarke v. Curtis, 530, 535, 538, 760, 1281.
Clarke v. Dunnivant, 1242, 1388, 1568.
Clarke v. McClure, 1110, 1117.
Clarke v. Merrill, 428.

[References to pages]

- Clarke *v.* Oliver, 614.
 Clarke *v.* Reins, 377, 1444, 1455.
 Clarkson *v.* Booth, 998, 1128.
 Clarkson *v.* Doddridge, 722.
 Clarkson *v.* Skidmore, 483, 497.
 Clarkston *v.* Va. Coal & Iron Co. 74.
 Clary *v.* Clary, 1367.
 Clary *v.* Owen, 37, 44.
 Claison *v.* Bailey, 1423, 1424.
 Claunch *v.* Allen, 1228.
 Clavering *v.* Clavering, 340, 525, 1282.
 Clay In re, 1481.
 Clay *v.* Chenault, 941.
 Clay *v.* Sharp, 690.
 Clay *v.* Walter, 1283, 1294.
 Clay *v.* White, 978.
 Clayton *v.* Blakeley, 932.
 Clayton *v.* Fawcett, 691.
 Claytor *v.* Anthony, 578, 1286.
 Clearwater *v.* Rose, 192.
 Cleaton *v.* Chambliss, 1308.
 Cleaver *v.* Kirk, 1023.
 Clegg *v.* Lemessurier, 1238.
 Clem *v.* Givens, 615, 1029, 1037.
 Clement *v.* Bank of Rutland, 1229, 1230.
 Clement *v.* Wheeler, 528.
 Clement *v.* Youngman, 93.
 Clemitt *v.* New York Life Ins. Co., 1214.
 Clendenin *v.* Maryland Construction Co., 1513.
 Clepper *v.* Livergood, 278.
 Clere's Case, 567, 880, 1486, 1487.
 Cleveland, etc., Stove Co. *v.* Wheeler, 472.
 Cleveland *v.* State Bank, 1466.
 Clevinger *v.* Miller, 789.
 Click *v.* Green, 1287.
 Clifford *v.* Burlington, 1496.
 Clift *v.* Clift, 413.
 Clifton *v.* Montague, 477.
 Clinan *v.* Cook, 1422, 1430.
 Clinch River Veneer Co. *v.* Kurth, 1355, 1571.
 Clinchfield Coal Co. *v.* Powers, 1435, 1436.
 Cline *v.* Catron, 631, 1119, 1124, 1125.
 Clinton *v.* Myers, 67.
 Clives Case, 1492.
 Clough *v.* Hasford, 459.
 Clough *v.* Thompson, 1277.
 Clowes *v.* Dickenson, 728.
 Clun's Case, 258, 260, 488, 491, 492, 493, 495.
 Clun *v.* Fisher, 258.
 Clute *v.* Barron, 1531.
 Clyne *v.* Helmes, 474.
 Coal Creek Min. Co. *v.* Heck, 123.
 Coalter *v.* Bryan, 1386.
 Coalter *v.* Hunter, 132, 1112, 1137, 1140.
 Coates *v.* Cheever, 340, 413, 524.
 Coates *v.* L. & N. R. Co., 1480.
 Cobb *v.* Arnold, 482.
 Cobb *v.* Davenport, 1145.
 Cobb *v.* Lavalie, 1090.
 Cochran *v.* Flint, 31, 34.
 Cochran *v.* Guild, 1223.
 Cochran *v.* O'Hern, 279.
 Cochran *v.* Paris, 754, 755, 1288.
 Cocke *v.* Gilpin, 713.
 Cocke *v.* Minor, 583.
 Cocke *v.* Philips, 273, 274, 315, 316, 317, 920.
 Cocker *v.* Cowper, 166.
 Cockrill *v.* Armstrong, 335.
 Cocks *v.* Izard, 1441.
 Cody *v.* Conly, 1378.
 Cody *v.* Quartermann, 466.
 Coffin *v.* Coffin, 539, 1367.
 Coffman *v.* Coffman, 311, 1067, 1360, 1378.
 Coffman *v.* Huck, 459.
 Coggins' Appeal, 936.

[References to pages]

- Coggs *v.* Bernard, 679.
 Cogswell *v.* Tibbetts, 360.
 Colcord *v.* Swan, 391.
 Coldiron *v.* Asheville Shoe Co., 25, 570, 774.
 Cole *v.* Cole, 1474.
 Cole *v.* Green, 521, 522.
 Cole *v.* Hadley, 133.
 Cole *v.* Lake, 191.
 Cole *v.* Scot, 759.
 Cole *v.* Sewell, 874.
 Cole *v.* Wade, 1480.
 Colgrove *v.* Dios Santos, 32, 47.
 Coleman's Case, 1390.
 Coleman *v.* Chadwick, 64.
 Coleman *v.* Cocke, 772, 1583.
 Coleman *v.* San Rafael Turnpike Road, 1544.
 Coleman *v.* Seymour, 884.
 Coles *v.* Coles, 313.
 Coles *v.* Trecothick, 1423, 1424, 1453.
 Coles *v.* Withers, 679, 680, 708, 715, 716, 723, 760, 761, 766.
 Coles *v.* Wooding, 1013.
 Colhoun *v.* Wilson, 503.
 Collamer *v.* Kelley, 1340.
 Collier *v.* Cowger, 1232.
 Collier *v.* Jenks, 42.
 Collingwood *v.* Pays, 1076, 1081.
 Collins *v.* Benbury, 71.
 Collins *v.* Carity, 470.
 Collins *v.* Castle, 1215.
 Collins *v.* Chartiers Valley Gas Co., 76.
 Collins *v.* Collins, 830.
 Collins *v.* Doe, 1545.
 Collins *v.* Foley, 1460.
 Collins *v.* Lynch, 1111.
 Collins *v.* Prentice, 130, 135.
 Collins Mfg. Co. *v.* Marcy, 629, 667.
 Collup *v.* Smith, 1393, 1400, 1559.
 Colman *v.* Sarel, 1450.
 Colman *v.* Shattuck, 1528.
 Colquhoun *v.* Atkinson, 694, 735, 1433, 1558.
 Colson *v.* Colson, 853.
 Colson *v.* Thompson, 1435.
 Colthurst *v.* Bejushin, 879.
 Coltrane *v.* Worrell, 601.
 Columbia College *v.* Lynch, 1215.
 Columbian Oil Co. *v.* Blake, 79.
 Colvin *v.* Warford, 463.
 Combe's Case, 982, 1195.
 Comber *v.* Hill, 868.
 Combs *v.* Combs, 941.
 Comer *v.* Chamberlain, 271, 283.
 Coming Ex parte, 1433.
 Commercial Bank *v.* Cunningham, 701.
 Commonwealth *v.* Ashlen, 774.
 Commonwealth *v.* Birchett, 84.
 Commonwealth *v.* Burdur, 578.
 Commonwealth *v.* Chapin, 71.
 Commonwealth *v.* Ford, 1102.
 Commonwealth *v.* Gibson, 1107.
 Commonwealth *v.* Hampton Institute, 1521.
 Commonwealth *v.* Hersey, 31.
 Commonwealth *v.* James River Co., 84.
 Commonwealth *v.* Kelley, 1513, 1514.
 Commonwealth *v.* Levy, 1370.
 Commonwealth *v.* Ricks, 1428.
 Commonwealth *v.* Selden 1242, 1558.
 Commonwealth *v.* Vincent, 72.
 Conduit *v.* Ross, 1217.
 Congdon *v.* Morgan, 1108.
 Conger *v.* Atwood, 399.
 Congham *v.* King, 516.
 Congleton *v.* Pattison, 511, 1212, 1216.
 Congregational Soc. *v.* Stark, 197.
 Conklin *v.* Egerton, 1481.

[References to pages]

- Connecticut Mut. Life Ins. Co. *v.* Talbott, 720.
 Conner *v.* Woodfill, 1146.
 Connolly *v.* Brantsler, 392.
 Connor *v.* Sullivan, 1143.
 Conover *v.* Smith, 511.
 Conover *v.* Wright, 397.
 Conrad *v.* Effinger, 1231.
 Conrad *v.* Harrison, 729, 785.
 Conrad *v.* Long, 653.
 Conrad *v.* Saginaw Min. Co., 40, 46.
 Consumer's Ice Co. *v.* Buxler, 508.
 Conway *v.* Alexander, 687, 688.
 Conway *v.* Cable, 1549.
 Conyers *v.* Scott, 1145.
 Cooch *v.* Goodman, 1237.
 Coogler *v.* Rogers, 1508.
 Cook *v.* Clayworth, 1160, 1161.
 Cook *v.* Cook, 221, 337, 968.
 Cook *v.* Fountain, 566.
 Cook *v.* Guerra, 868.
 Cook *v.* Humber, 438.
 Cook *v.* Laster, 1533.
 Cook *v.* Pridgen, 166.
 Cook *v.* Seaboard Ry., 68, 70.
 Cook *v.* Simmons, 1527.
 Cook *v.* Stearns, 160.
 Cook *v.* Tullis, 575.
 Cooke, *Ex parte*, 877.
 Cooke *v.* Turner, 1413.
 Cool *v.* Peters, 163.
 Cooley *v.* Philadelphia Wardens, 72.
 Coolidge *v.* Learned, 1138.
 Coombs, *Ex parte*, 1433.
 Coombs *v.* Jordan, 29.
 Coomler *v.* Heffner, 469.
 Coons *v.* Coons, 566, 571.
 Cooper *v.* Adams, 456.
 Cooper *v.* Cooper, 202, 386.
 Cooper *v.* Hepburn, 714, 824, 839, 960.
 Cooper *v.* Johnson, 40.
 Cooper *v.* Joynes, 867.
 Cooper *v.* Macdonald, 280.
 Cooper *v.* Merritt, 767.
 Cooper *v.* Trustees, 158.
 Cooper *v.* Woolfit, 49.
 Cooper *v.* Wyatt, 667.
 Cooth *v.* Jackson, 1433.
 Coots *v.* Yewell, 839.
 Cope *v.* Rowland, 264.
 Copeland *v.* McAdory, 1228.
 Coppage *v.* Alexander, 653, 656, 658.
 Corbet's Case, 878, 946.
 Corbett *v.* Hill, 31.
 Corbett *v.* Lauren's, 252.
 Corbett *v.* Nutt, 1536.
 Corder *v.* Morgan, 690, 747.
 Cordles *v.* Cordles, 938.
 Cordova *v.* Hood, 585.
 Corey *v.* Moore, 1565, 1571.
 Cornell *v.* Todd, 122.
 Cornett *v.* Rhudy, 67, 1140.
 Corning, *Ex parte*, 693.
 Corning *v.* Gould, 137, 141.
 Cornish *v.* Cawsey, 441.
 Corr *v.* Porter, 346, 371, 373, 1405, 1406, 1407.
 Corporation of London *v.* Riggs, 122, 126, 130.
 Corse *v.* Chapman, 831, 839, 1473.
 Cory *v.* Cory, 1160.
 Coryton *v.* Helyar, 237.
 Cosborne *v.* Scarfe, 329.
 Costigan *v.* Penn. R. Co., 1217.
 Cotting *v.* DeSartiges, 1488.
 Cottington *v.* Fletcher, 1432.
 Cottrell *v.* Hampton, 589.
 Couch *v.* Eastham, 1367.
 Coulter *v.* Norton, 508.
 Coulthard *v.* Davis, 1091.
 Coulthard *v.* Stevens, 1088.
 Counden *v.* Clerke, 841, 955.
 Countz *v.* Geiger, 1169.
 Coupe *v.* Platt, 473.
 Courtney *v.* Taylor, 703.

[References to pages]

- Coutts *v.* Walker, 578, 582, 684, 779.
 Covington *v.* McNickle, 1103.
 Cowan *v.* Radford Iron Co., 455.
 Coward *v.* Marshall, 1396.
 Cowell *v.* Colorada Springs Co., 623, 660, 667, 901, 1173.
 Cowen *v.* Sunderland, 477.
 Cowlan *v.* Slack, 89.
 Cowles *v.* Brown, 754, 755, 1464.
 Cowles *v.* Kidder, 70, 164, 166.
 Cowling *v.* Higginson, 1141.
 Cox *v.* Arnold, 1089, 1091.
 Cox *v.* Couch, 1255.
 Cox *v.* Forrest, 137, 1142, 1145.
 Cox *v.* James, 133.
 Cox *v.* McGowan, 1158.
 Cox *v.* McMullin, 978, 1034, 1036.
 Cox *v.* Romine, 1589.
 Coxe *v.* Gibson, 1530.
 Crab *v.* Pratt, 332.
 Crabtree *v.* Baker, 154.
 Crabtree *v.* Bramble, 331.
 Craddock *v.* Riddesbarger, 49, 53.
 Craig *v.* First Presbyterian Church, 158, 159.
 Craig *v.* Hoge, 1279.
 Craig *v.* Leslie, 25.
 Craig *v.* Sebrell, 781.
 Craig *v.* Van Bebbber, 1156, 1157, 1158.
 Craig *v.* Walthall, 379.
 Craig *v.* Watson, 55.
 Craige *v.* Morris, 399.
 Cralle *v.* Cralle, 264, 305.
 Cramer *v.* Senger, 1296.
 Crampton *v.* Prince, 759.
 Crane *v.* Bingham, 40.
 Crary *v.* Goodman, 1113.
 Crawford *v.* Jones, 480.
 Crawford *v.* Langmaid, 1462.
 Crawford *v.* McDaniel, 1303, 1446, 1447.
 Crawford *v.* Patterson, 624, 629, 638, 1215, 1311.
 Crawford *v.* Taylor, 1290.
 Crawford *v.* Witherbee, 1217.
 Crebs *v.* Jones, 1267.
 Creech *v.* Crockett, 461.
 Creekmur *v.* Creekmur, 248, 480, 1103, 1110, 1112, 1123.
 Cregier *In re*, 274, 318, 319.
 Creigh *v.* Henson, 454, 1110, 1117.
 Crenshaw *v.* Slate River Co., 73, 1088.
 Cresap *v.* McLean, 1132.
 Crest *v.* Jack, 30.
 Crews *v.* Pendleton, 17, 21, 22, 62, 709, 713.
 Crews *v.* Hatcher, 825, 831, 835.
 Cribbins *v.* Markwood, 1268, 1272, 1454.
 Cripps *v.* Wolcott, 830.
 Crisman *v.* Johnson, 1542.
 Criswell *v.* Grumbling, 244.
 Crocker *v.* Old South Society, 647.
 Croft *v.* Croft, 1384.
 Croft *v.* Lumley, 664.
 Croft *v.* Powel, 690.
 Crommelin *v.* Thiess, 466.
 Crone *v.* Odell, 221.
 Crooker *v.* Jewell, 1230.
 Crosdale *v.* Lanigan, 161, 165.
 Crosland *v.* Pottsville, 156.
 Crosland *v.* Rogers, 131.
 Cross' Curatrix *v.* Cross' Legatees, 597.
 Cross *v.* Lewis, 1148.
 Cross *v.* Marston, 31.
 Crosse *v.* Young, 1228.
 Crossman *v.* Field, 910.
 Crouch *v.* Fowle, 498.
 Crouch *v.* Puryear, 340, 525.
 Crow *v.* Kightlinger, 268.
 Crowder *v.* Garber, 1296.
 Crowell *v.* Hospital of St. Barnabas, 727.
 Crowell *v.* Packard, 1223.
 Croxall *v.* Shererd, 1099.

[References to pages]

- Crump v. Norwood*, 324, 325.
Crump v. U. S. Min. Co., 1266.
Cruse v. McKee, 1464, 1493.
Crusoe v. Bugby, 504.
Cubitt v. Porter, 148.
Cucullu v. Lumber Co., 1521.
Cueman v. Broadnax, 1485.
Culber v. Harper, 335.
Culbertson's Representative v. Stevens, 312, 403, 760.
Cummins v. Beaver, 1437, 1457.
Cumming v. Cumming, 728.
Cundell v. Dawson, 1264.
Cunningham v. Holton, 456.
Cunningham v. Horton, 466.
Cunningham v. Moody, 331, 354, 1475.
Cunningham v. Robertson, 1120.
Curl v. Lowell, 463.
Currie v. Donald, 1191, 1242, 1245, 1246, 1568, 1574.
Currie v. Page, 1169.
Currier v. Barker, 467.
Currin v. Spraul, 1028.
Curtis v. Curtis, 1271.
Curtis v. Galvin, 460.
Curtis v. Leavitt, 1237.
Curtis v. Lunn, 1585, 1592.
Curtis v. Perry, 1450.
Curtis v. Thompson, 714.
Curtiss v. Ayrault, 77, 154, 155.
Cushing v. Longfellow, 1529.
Cushing v. Spaulding, 661.
Custis v. Snead, 1036.
Cutler v. Smith, 163.

Dabney v. Kennedy, 1574, 1580.
Da'Costa v. Davis, 650.
Daily v. Warren, 722.
Daingerfield v. Smith, 897.
Dair v. United States, 1505.
Dakin v. Williams, 645.
Dale v. Bartley, 864.
Daley v. Norwich Co., 474, 476.

Dalton v. Angus, 146.
Daly v. James, 1489.
Daly v. Wise, 477.
Dame v. Dame, 30, 31, 35.
Damren v. American Light & Power Co., 486.
Dana v. Valentine, 136, 152.
Dance v. Seaman, 1288.
Dandridge v. Harris, 1436.
Dandridge v. Minge, 718.
Danforth v. Smith, 335.
Daniel Ball, The, 71.
Daniel v. Camplin, 973.
Daniel v. Case, 1542.
Daniel v. Leitch, 719, 1302, 1443.
Daniel v. McManama, 293.
Daniel v. North, 152.
Daniel v. Whartonby, 960.
Daniel v. Wood, 158.
Daniels v. Pond, 41, 42.
Darby's Countess of Case, 835, 836.
Darcus v. Crump, 863.
D'Arcy v. Blake, 277, 329, 336.
Dark v. Johnston, 118, 164, 165.
Darley Colliery Co. v. Mitchell, 145.
Darling v. Cumming, 1422.
Darlington v. McCoole, 1451.
Darlington v. Pulteney, 384.
Darnall v. Smith, 1168.
Darnes v. Lloyd, 1021.
Dartmouth College v. Woodward, 83, 85.
Datesman's Appeal, 252.
Daud v. Kingscote, 87.
Dauenhauer v. Devine, 147.
Davenport v. Bishopp, 1295.
Davenport v. Magoon, 521.
Davenport v. Oldis, 868.
Davenport v. Reg., 646.
Davenport v. Savil, 376.
Davenport v. Shants, 36, 37.
Davidson v. Reed, 1510.

[References to pages]

- Davie *v.* Briggs, 328.
 Davies *v.* Miller, 195.
 Davis *v.* Anderson, 793, 1293.
 Davis *v.* Bawcum, 888.
 Davis *v.* Beasley, 758, 1564, 1565, 1566, 1571, 1585.
 Davis *v.* Bonney, 1279.
 Davis *v.* Brocklebank, 460.
 Davis *v.* Burton, 1239.
 Davis *v.* Calvert, 1369.
 Davis *v.* Christian, 26, 314, 1069, 1482, 1483.
 Davis *v.* Davis, 256, 1248, 1299, 1385, 1387, 1509.
 Davis *v.* Dudley, 1158.
 Davis *v.* Eastham, 44.
 Davis *v.* Emery, 45.
 Davis *v.* Eyton, 60.
 Davis *v.* Getchell, 67.
 Davis *v.* Gilliam, 523.
 Davis *v.* Harman, 592, 600.
 Davis *v.* Heppert, 201, 244, 942.
 Davis *v.* Howcott, 1489.
 Davis *v.* Jones, 376, 1417, 1455.
 Davis *v.* Judd, 1237.
 Davis *v.* Leo, 539.
 Davis *v.* McArthur, 1108.
 Davis *v.* Mason, 269, 277.
 Davis *v.* Miller, 722.
 Davis *v.* Minge, 1547.
 Davis *v.* Morriss, 1300.
 Davis *v.* Norton, 886.
 Davis *v.* Owen, 1114.
 Davis *v.* Page, 384.
 Davis *v.* Parker, 377.
 Davis *v.* Roller, 784, 789.
 Davis *v.* Rowe, 1066, 1071, 1072, 1073, 1074.
 Davis *v.* Sims, 1566, 1585.
 Davis *v.* Smith, 1228.
 Davis *v.* Stroud, 1120.
 Davis *v.* Stevens, 968.
 Davis *v.* Teays, 581, 708.
 Davis *v.* Townsend, 403.
 Davis *v.* Turner, 1272, 1288.
 Davis *v.* Waddington, 439, 455.
 Davis *v.* Winston, 72.
 Davis Co. *v.* Augustus, 1289.
 Davock *v.* Nealon, 1107.
 Davy *v.* Smith, 1390.
 Dawson *v.* St. Paul, etc., Ins. Co., 133, 137, 138.
 Dawson *v.* Thurston, 1565.
 Dawson *v.* Watkins, 1103, 1109, 1119, 1129.
 Day *v.* Brenton, 582.
 Day *v.* Caton, 148.
 Day *v.* Chisholm, 1228.
 Day *v.* Cochran, 276.
 Day *v.* Day, 71.
 Day *v.* Hale, 766.
 Day *v.* Trigg, 1251.
 Day *v.* Walden, 134, 136, 140.
 Deacon *v.* Doyle, 141, 1223.
 Dean of Windsor *v.* Glover, 98, 102.
 Dean *v.* Richmond, 264.
 Dean *v.* Walker, 727.
 Deane *v.* Hansford, 938, 940, 957.
 Deane *v.* Hutchinson, 46.
 Dearborn *v.* Taylor, 371.
 Dearmond *v.* Dearmond, 349.
 Deaton *v.* Taylor, 646.
 Debow *v.* Colfax, 60, 61.
 Deck *v.* Tabler, 571, 593.
 Deerfield *v.* Arms, 71, 1090.
 Deering & Co. *v.* Kerfoot, 26, 314.
 Deerly *v.* Duchess of Mazarine, 1164.
 De Farges *v.* Ryland, 1295.
 De Forest *v.* Thompson, 1533.
 De Frieze *v.* Quint, 1542.
 Degman *v.* Degman, 1464, 1497.
 Degraffenried *v.* Scruggs, 38.
 De Gray *v.* Monmouth Beach Club House Co., 1215.
 De Grey *v.* Richardson, 269.
 De Haro *v.* United States, 164, 167.

[References to pages]

- De Lahoussaye v. Judice*, 155.
Delaney v. Goddin, 1543.
Delano v. Cushing, 434.
Delaplane v. Crenshaw, 1136.
Dellett v. Kemble, 1508.
Dellinger v. Foltz, 711, 765.
Deloney v. Hutcheson, 565.
Demarest v. Wynkoop, 704, 1101.
Demby v. Parse, 48.
Demill v. Reid, 860, 865.
Deming v. Bullitt, 1237.
De Mott v. Hagerman, 55.
Demuth v. Anweg, 1145.
Den v. Demarest, 268.
Den v. Fogg, 202.
Den v. Roake, 1486, 1487.
Deneale v. Morgan, 1481, 1482.
Denham v. Holeman, 1109.
Denn v. Cartwright, 427.
Denn v. Gillot, 846.
Denn v. Puckey, 873, 955.
Denn v. Slater, 202.
Dennett v. Hopkinson, 53.
Dennis v. Wilson, 116.
Denson v. Autrey, 1067.
Denster v. McCamus, 731.
Denton v. Clarke, 1482.
Denton v. Leddell, 131.
De Peyster v. Michael, 659, 660, 663, 667.
Devaynes v. Robinson, 1466.
Devereux v. McMahon, 1237.
Devinele v. Bliss, 1241.
Devonshire v. Eglin, 166.
Devore v. Sunderland, 1221.
Dew v. Clark, 1366.
De Wahl v. Brawne, 1164.
De Witte v. De Witte, 222, 968.
Dewitt v. Pierson, 508.
Dexter v. Beard, 1217.
Dexter v. Manley, 483, 499.
D'Eyncourt v. Gregory, 48.
Dezendorf v. Humphreys, 1166.
Dick v. Harby, 1479, 1486.
Dickens v. Barnes, 1249.
Dickenson v. Davis, 739.
Dickenson v. Gray, 407.
Dickerson v. Colgrove, 1099, 1508.
Dickinson's Appeal, 600.
Dickinson v. Dickinson, 1200, 1376.
Dickinson v. Hoomes, 509, 514, 1214, 1216.
Didier v. Patterson, 683, 700, 1288.
Didlake v. Hooper, 938.
Diehl v. Emig, 1241, 1242.
Digby v. Atkinson, 502.
Dikeman v. Dikeman, 1539.
Dill v. Board, etc., 133, 136, 140.
Dillard v. Dillard, 399, 608, 609, 754, 755, 1476, 1480.
Dilliard v. Tomlinson, 1066, 1069.
Dilling v. Murray, 68.
Dimmick v. Lockwood, 1232.
Dingley v. Buffum, 456.
Dingus v. Minneapolis Imp. Co., 760, 762, 774.
Dinning v. Dinning, 1381.
Dircks v. Brant, 57.
Disher v. Disher, 523.
Dishayer v. Maitland, 1248.
Divver v. McLaughlin, 700.
Dixon v. Clayville, 724.
Dixon v. McCue, 379, 383.
Dixon v. Niccolls, 486.
Dixon v. Parker, 683.
Dixs v. Atkins, 428.
Doane v. Badger, 143.
Dobbins v. Duquid, 483.
Dobson v. Culpepper, 581.
Dobson v. Jones, 439.
Dodd v. Burchell, 126.
Dodd v. Holmes, 146.
Dodge v. McClintock, 165.
Dodge v. Stacy, 1143.
Dodson v. Hay, 278.
Doe v. Allen, 18, 1533.
Doe v. Amey, 467.
Doe v. Applin, 219, 955.

[References to pages]

- | | |
|----------------------------------|--------------------------------|
| Doe v. Ashburner, 445. | Doe v. Perkes, 398. |
| Doe v. Barksdale, 1100, 1101. | Doe v. Perryn, 839. |
| Doe v. Bell, 465, 467. | Doe v. Plowman, 580. |
| Doe v. Bingham, 1308, 1310. | Doe v. Porter, 466, 1258. |
| Doe v. Brabant, 921. | Doe v. Provoost, 829, 839. |
| Doe v. Browne, 455, 468. | Doe v. Richards, 455. |
| Doe v. Burnsale, 188, 824. | Doe v. Samuel, 465. |
| Doe v. Burt, 31. | Doe v. Scott, 887. |
| Doe v. Carleton, 947. | Doe v. Seaton, 1504. |
| Doe v. Carter, 664. | Doe v. Selby, 924. |
| Doe v. Chamberlaine, 454. | Doe v. Shepard, 886. |
| Doe v. Chaplin, 978. | Doe v. Smaridge, 461. |
| Doe v. Clare, 444. | Doe v. Thompson, 1258. |
| Doe v. Collis, 195, 219. | Doe v. Turner, 55. |
| Doe v. Considine, 198, 831, 839. | Doe v. Underdown, 1410. |
| Doe v. Dill, 923. | Doe v. Watt, 664. |
| Doe v. Dixon, 427. | Doe v. Webb, 869. |
| Doe v. Ellis, 873. | Doe v. Wells, 1475. |
| Doe v. Eyre, 922. | Doe v. Willes, 354. |
| Doe v. Fonnereau, 824, 939. | Doe v. Wilson, 523. |
| Doe v. Galloway, 1251. | Doe v. Wood, 93, 466. |
| Doe v. Groves, 444. | Doherty v. Allman, 521, 522. |
| Doe v. Gwinne, 405. | Dohoney v. Taylor, 1489. |
| Doe v. Harris, 1397. | Doland v. Mooney, 1528. |
| Doe v. Hazell, 469. | Dold v. Geiger, 1463. |
| Doe v. Hull, 463. | Dolph v. Hand, 1156. |
| Doe v. Lancashire, 1390. | Dolph v. White, 510. |
| Doe v. Langdon, 580. | Donaldson v. Hibner, 1509. |
| Doe v. Lanning, 848. | Donegan v. Donegan, 993. |
| Doe v. Lock, 122, 1204. | Donellan v. Read, 434. |
| Doe v. Lyde, 937. | Donnell v. Bellas, 1529. |
| Doe v. Manifold, 1390. | Donohoo v. Lea, 571. |
| Doe v. McKaeg, 460. | Donovan v. Ward, 1158. |
| Doe v. Manning, 1282. | Dooley v. Baynes, 1013, 1324. |
| Doe v. Martin, 354, 884, 1475. | Dooley v. Christian, 1535. |
| Doe v. Masters, 632. | Doolin v. Ward, 1441. |
| Doe v. Minge, 1522. | Doolittle v. Lewis, 1469. |
| Doe v. Morgan, 918, 972. | Dooly v. Stringham, 521. |
| Doe v. Moore, 832, 910. | Doran v. Piper, 1466. |
| Doe v. Norvell, 832, 910. | Doremus v. Cameron, 1547. |
| Doe v. Oliver, 1215, 1504, 1505. | Dority v. Dunning, 139. |
| Doe v. Palmer, 470. | Dorman v. Ames, 70. |
| Doe v. Parratt, 973. | Dorman v. Bates M'fg Co., 133. |
| Doe v. Pearson, 661. | Dorr v. Johnson, 937. |

[References to pages]

- Dorr v. Lovering*, 839, 936.
Dorrell v. Johnson, 462.
Dorrier v. Masters, 793.
Dorris v. King, 52.
Dorris v. Sullivan, 120.
Dorrity v. Rapp, 146.
Doswell v. Buchanan, 585, 768, 1210, 1588, 1597.
Doty v. Beasley, 1541.
Dougherty v. Matthews, 645.
Douglas v. Cooney, 134.
Douglas v. Stone, 1519.
Douglas Co. v. Com., 1519.
Douglass v. Dickson, 310.
Douglass v. Fagg, 789.
Douglass v. Yallop, 1564, 1565.
Dougrey v. Topping, 392.
Dovaston v. Payne, 149.
Dow v. Doyle, 869.
Dowell v. Tucker, 1101.
Downard v. Groff, 62.
Downer v. Smith, 1220, 1224.
Downey v. Nutt, 1517.
Downing v. Marshall, 912.
Downing v. Mays, 1105.
Downshire v. Sandys, 527, 528.
Doyle v. Lord, 128.
Doyle v. Union Pac. Ry. Co., 477.
Drake v. Brown, 892.
Drake v. Lacoe, 508.
Drake v. Wells, 167, 169.
Drew v. Drew, 1528.
Drew v. Peer, 166.
Druid Park Heights Co. v. Oettinger, 1477, 1480.
Drummond v. Drummond, 922.
Drummond v. Richards, 703.
Drury v. Foster, 391.
Drury v. Holden, 729.
Drury v. Kent, 89.
Drusadow v. Wilde, 1486.
Dryden v. Frost, 1595.
Dubber v. Trollope, 854.
Dubois v. Beaver, 22.
Dubois v. Kelly, 41.
Du Bois Cemetery Co. v. Griffin, 1513.
Duckett v. Crider, 1101.
Dudley v. Dudley, 350.
Dudley v. Foote, 34, 45, 46.
Duffield v. Rosenzweig, 93.
Dugan v. Lewis, 670.
Dugger v. Dugger, 279.
Duhring v. Duhring, 27, 314.
Duke v. Brandt, 333.
Duke v. Harper, 435.
Dulaney v. Dulaney, 81.
Dulaney v. Willis, 692, 1581, 1583.
Dulany v. Middleton, 910.
Dummerston v. Newfane, 396.
Dumn v. Rothermel, 432.
Dumpor's Case, 505, 629, 630, 643, 646, 664.
Dunbar v. Woodcock, 916, 917.
Duncan v. Jaudan, 583, 585.
Duncan v. Louisville, 723.
Duncan v. Rodecker, 134.
Duncan v. Terre Haute, 345.
Duncklee v. Webber, 482, 498.
Duncomb v. Duncomb, 355, 356, 620.
Duncombe v. Felt, 528.
Dundas v. Hitchcock, 391.
Dunham v. Kirkpatrick, 63.
Dunham v. Lamphire, 72.
Dunham v. Osborn, 318, 320, 323.
Dunklee v. Wilton R. Co., 131, 1223.
Dunlap v. Bullard, 509, 1340.
Dunn v. Flood, 901.
Dunn v. Stowers, 1443.
Dunnage v. White, 1160.
Dunnock v. Dunnock, 349.
Dunscomb v. Dunscomb, 278, 754.
Dunseth v. Bank of United States, 406.
Dunsmore v. Lyle, 1455.
Duppa v. Mayo, 260, 493, 622.

[References to pages]

- Durando v. Durando*, 315, 317, 318, 320.
Durbin v. Roanoke B'ld'g Co., 1256.
Durham & S. Ry. Co. v. Walker, 122, 1204, 1205.
Durour v. Motteux, 1410.
Dury v. Cray, 1253.
Duryee v. New York, 646.
Dutcher v. Culver, 101.
Duval v. Bibb, 759, 1348.
Dyer v. Dyer, 569, 572, 575.
Dyer v. Eldridge, 1113.
Dyer v. St. Paul, 145.
Dyer v. Sanford, 120.
Dyett v. Pendleton, 507.
Dyster, Ex parte, 1454.

Eager v. Furnivale, 269.
Eakin v. Brown, 472.
Eames v. Salem & L. R. Co., 150.
Earl v. De Hart, 154.
Earl of Portmore v. Taylor, 394.
Earle v. Arbogast, 449, 478.
Earle v. Wilson, 948.
Early v. Doe, 1524.
Early v. Friend, 981, 999, 1000, 1032.
Earp v. Bootlie, 687.
Easley v. Barksdale, 794.
East Hampton v. Kirk, 1089.
East Jersey Iron Co. v. Wright, 167.
Easterbrook v. Tillinghast, 568.
Eastman v. Foster, 724.
Eaton v. Whittaker, 435.
Eaves v. Vial, 567.
Ecclesiastical Com'rs v. Kino, 139.
Eckerson v. Crippen, 1148.
Eclipse Oil Co. v. South Penn Oil Co., 455.
Edge v. Strafford, 432.
Edgerton v. Page, 508.
Edmison v. Loury, 508.
Edmunds v. Pobey, 737.

Edmundson v. Montague, 392.
Edrington v. Harper, 376, 683.
Edson v. Munsell, 1140.
Edwards v. Bibb, 293.
Edwards v. Countess of Warwick, 1294.
Edwards v. Freeman, 1020.
Edwards v. Hale, 463.
Edwards v. Hammond, 830, 832, 910.
Edwards v. New York & H. R. Co., 473.
Edwards v. Wall, 683.
Edwards v. West, 570.
Effinger v. Hall, 24, 252, 1232, 1594.
Effinger v. Lewis, 455.
Effinger v. Ralston, 714.
Ege v. Ege, 485.
Ehrman v. Mayer, 493, 494.
Eidson v. Huff, 739, 741, 1582, 1583.
Einstein v. Gay, 1541.
Elam v. Keen, 721.
Elder v. Burrus, 73.
Eldred v. Meek, 933, 935, 936.
Eldredge v. Forrestal, 316, 318, 323.
Eldridge v. Fisher, 956, 963.
Electric City Land, etc., Co. v. West Ridge Coal Co., 1217.
Eleventh Avenue, In re, 1512.
Elgin v. Hall, 1308.
Elias v. Snowden Slate Quarries, 525.
Eliaison v. Grove, 131.
Elkins v. Edwards, 716.
Ellington v. Ellington, 1120.
Elliot v. Davis, 1194.
Elliot v. Fitchburg R. Co., 66.
Elliot v. Merryman, 586, 587, 589, 590.
Elliot v. Rhett, 22, 127, 131.
Elliot v. Sleeper, 1201.
Elliott v. Carter, 592, 600, 719, 1043.
Elliott, Ex parte, 1498.
Elliott v. Sackett, 726.

[References to pages]

- Elliott *v.* Smith, 481.
 Elliott *v.* Stone, 461.
 Ellis *v.* Bassett, 129, 141.
 Ellis *v.* Blue Mountain Forest Ass'n, 125.
 Ellis *v.* Ellis, 610.
 Ellis *v.* Paige, 435, 460.
 Ellis' Case, 1390.
 Ellithorpe *v.* Reidesil, 53.
 Ellsworth *v.* Low, 1537.
 Ellwood *v.* Plummer, 829, 892.
 Elmandorff *v.* Carmichael, 1176.
 Elmendorff *v.* Lockwood, 391, 396.
 Elwes *v.* Mawe, 29, 30, 33, 40, 41, 44, 47, 48.
 Elwood *v.* Klock, 320, 346.
 Elys *v.* Wynne, 247, 1128.
 Embury *v.* Sheldon, 830.
 Emerick *v.* Tavener, 246, 248, 479, 480, 621.
 Emerson *v.* Harris, 291, 292, 306.
 Emerson *v.* Proprietors, etc., 1228.
 Emerson *v.* Simpson, 511.
 Emerson *v.* Stratton, 1445, 1446, 1447.
 Emery *v.* Fowler, 1258.
 Emery *v.* Harrison, 1545.
 Emery *v.* Railroad Co., 70, 1146.
 Emery *v.* Wase, 376, 1455.
 Emmons *v.* Scudder, 464.
 Enders *v.* Burch, 775, 776.
 Enfield Toll Bridge Co. *v.* Hartford & New Haven R. Co., 83.
 Engel *v.* Ayer, 115, 123, 195, 196.
 Engle *v.* Haines, 728, 729.
 Enos *v.* Sanger, 727.
 Eppes *v.* Cole, 500.
 Eppes *v.* Randolph, 1244, 1348, 1558, 1559.
 Epps *v.* Flowers, 1159.
 Equitable Life Assur. Soc. *v.* Brennan, 1214.
 Erck *v.* Church, 1107.
 Erskine *v.* North, 248, 480.
 Erskine *v.* Townsend, 706.
 Eslava *v.* Lepretre, 311.
 Espley *v.* Wilkes, 133.
 Essex *v.* Atkins, 1166, 1167.
 Estabrook *v.* Royon, 1530.
 Eureka Co. *v.* Edwards, 1158.
 Eustace *v.* Gaskins, 1133.
 Evans *v.* Bicknell, 1508.
 Evans *v.* Bidwell, 481.
 Evans *v.* Brady, 196.
 Evans *v.* Evans, 293, 1394.
 Evans *v.* Greenhow, 676, 1280, 1283, 1585.
 Evans *v.* Hamrick, 509, 517.
 Evans *v.* Kingsberry, 1443.
 Evans *v.* Rice, 692.
 Evans *v.* Roanoke Sav. Bank, 732, 734, 736, 765.
 Evans *v.* Roberts, 53.
 Evans *v.* Spurgin, 1108, 1117, 1144, 1243.
 Evans *v.* Stewart, 327.
 Evans *v.* Webb, 395.
 Evanturel *v.* Evanturel, 1413.
 Evelyn *v.* Templar, 1282.
 Everett *v.* Edwards, 132.
 Everson *v.* McMullen, 338, 402.
 Ewing *v.* Burnett, 1108, 1129.
 Ewing *v.* Litchfield, 671, 672.
 Ewing *v.* Smith, 1496.
 Exchange Bank of Va. *v.* Knox, 1494, 1581.
 Farebrother *v.* Simmons, 1425.
 Fargason *v.* Edrington, 1595.
 Farish *v.* Wayman, 201, 237, 244, 942, 1474.
 Farlow *v.* Farlow, 1487.
 Farmer *v.* Ray, 397.
 Farmers' Bank *v.* Mutual Assur. Soc. 514.
 Farmers' Nat. Bank *v.* Gates, 727.
 Farnum *v.* Buffum, 1525.
 Farrand *v.* Gleason, 1002.

[References to pages]

- Farrar v. Winterton*, 571.
Farrington v. Kimball, 513.
Faulcon v. Johnston, 55.
Faulk v. Dashiell, 1466.
Faulkner v. Brockenbrough, 696.
Faulkner v. Davis, 596, 890, 1156, 1159, 1470, 1477, 1489.
Faulkner v. Faulkner, 387.
Fawcett v. York & N. M. Ry. Co., 150.
Fay v. Brewer, 527, 534, 706.
Fay v. Cheney, 706.
Fay v. Muzzey, 42.
Fay, Petitioner, 83.
Fay v. Wood, 1507.
Fayette Land Co. v. Louisville & N. R. Co., 765, 1173, 1181, 1264.
Feazle v. Dillard, 722.
Feeney v. Howard, 1261.
Fell v. Brown, 756.
Fellowes v. New Haven, 145.
Fellows v. Miner, 612.
Feltiplace v. Gorges, 1166.
Fenlason v. Rackliff, 46.
Fentiman v. Smith, 165.
Fenton v. Holloway, 1161.
Fenton v. Miller, 1242.
Fentress v. Pocahontas Fowling Club, 1255.
Fenwick v. Reed, 1112.
Feoffees of Grammar School v. Proprietors, etc., 126.
Ferguson v. Cornish, 427.
Ferguson v. Daughtrey, 1280, 1285.
Ferguson v. Franklin, 593.
Ferguson v. Spencer, 166.
Ferrea v. Knipe, 66.
Ferrell v. Ferrell, 1143.
Ferris v. Quinby, 38.
Ferry v. Laibie, 1465.
Ferson v. Dodge, 887.
Festing v. Allen, 837, 860, 906.
Ficklin v. Rixey, 403, 1223.
Fidelity Loan & Trust Co. v. Dennis, 806.
Fidler v. Lash, 1498.
Field v. Brown, 1140, 1144.
Field v. Holland, 742.
Field v. Mark, 126.
Field v. Mills, 509.
Field v. Snell, 1230.
Fifield v. Bank, 30, 34.
Fifield v. Van Wyck, 612, 613, 1174, 1371, 1413.
Fillemore v. Barry, 1423.
Filler v. Tyler, 373.
Finch v. Causey, 1301.
Finch v. Finch, 596.
Finch v. Marks, 1166.
Finch v. Ullman, 1113.
Finch v. Winchelsea, 1583.
Findlay v. Smith, 76, 342, 523, 524, 525, 533.
Findlay v. Toncray, 582, 1228.
Findley v. Findley, 379, 387.
Finlayson v. Finlayson, 1262.
Finley v. Simpson, 727.
Fiott v. Com., 1575, 1577.
Firestone v. Firestone, 310, 350.
First Baptist Church v. Witherell, 157.
First Baptist Soc. v. Grant, 157.
First Nat. Bank v. Beegle, 51.
First Nat. Bank of Harrisonburg v. Paul, 1572, 1573.
First Universalist Soc. of North Adams v. Boland, 901.
Fischer v. Johnson, 163, 167.
Fischer v. Lee, 1592.
Fischer v. Popham, 1388.
Fish v. Dodge, 473.
Fishburne v. Ferguson, 1156, 1267.
Fisher v. Bassett, 583.
Fisher v. Clements, 256.
Fisher v. Dixon, 44.
Fisher v. Fair, 115.
Fisher v. Grimes, 315.
Fisher v. Lightall, 477.
Fisher v. Thuckell, 474.
Fisher v. Wister, 941.

[References to pages]

- Fisk *v.* Cushman, 398.
 Fiske *v.* Tolman, 726.
 Fitch *v.* Johnson, 1217.
 Fitchburg Cotton Manufactory Corp. *v.* Melven, 491.
 Fitchett *v.* Smith, 1078.
 Fitzgerald *v.* Anderson, 47.
 Fitzgerald *v.* Standish, 1482.
 Fitzhugh *v.* Anderson, 1274.
 Fitzhugh *v.* Croghan, 1220.
 Fitzhugh *v.* Foote, 987.
 Fitzhugh *v.* Jones, 1422.
 Fitzpatrick *v.* Boston & M. R. Co., 136, 137.
 Fitzpatrick *v.* Fitzpatrick, 222.
 Flack *v.* Green Island, 1514.
 Fladung *v.* Rose, 990.
 Flagg *v.* Flagg, 706.
 Flagg *v.* Gultmacher, 727.
 Flaherty *v.* Moran, 151.
 Flanagan *v.* Grimmet, 1517, 1518, 1524, 1529, 1540, 1542, 1545, 1547.
 Flanary *v.* Kane, 571, 772, 774, 778, 780, 1233, 1251, 1506.
 Flaten *v.* Moorhead, 135.
 Fleet *v.* Hawkins, 1448.
 Fletcher *v.* Ashburner, 331.
 Fletcher *v.* Ashley, 350, 1273.
 Fletcher *v.* Evans, 163.
 Fletcher *v.* Herring, 42.
 Flickinger *v.* Shaw, 166.
 Flight *v.* Ballard, 1437.
 Flood *v.* Flood, 1369.
 Flook *v.* Armentrout, 1268, 1282.
 Florance *v.* Morien, 1250, 1579, 1592.
 Flower, *In re*, 1472.
 Floyd *v.* Harding, 1432, 1583.
 Floyd *v.* Harrison, 682, 691, 756.
 Floyd *v.* Ricks, 49, 52.
 Fludice *v.* Lombe, 489.
 Fluker *v.* Georgia Railway, etc., 165, 167.
 Flynn *v.* Flynn, 345, 347.
 Flynn *v.* Jackson, 1295.
 Foley *v.* Burwell, 666.
 Foley *v.* McKeown, 1447.
 Foley *v.* Wyeth, 144.
 Folsom *v.* Underhill, 1513.
 Foot *v.* New Haven & H. Co., 166, 167.
 Foote *v.* Burnet, 1232.
 Foote *v.* Gooch, 44.
 Forbes *v.* Balenseifer, 161, 167.
 Forbes *v.* Com., 137, 138.
 Forbes *v.* Gracey, 63.
 Forbes *v.* Smith, 278.
 Ford *v.* Cobb, 36, 37, 38, 44.
 Ford *v.* Harris, 136.
 Forkner *v.* Stuart, 687, 1195.
 Forqueran *v.* Donnally, 1539, 1540.
 Forsaith *v.* Clark, 195.
 Forsythe *v.* Price, 56, 59.
 Fort Smith *v.* McKibbin, 1103.
 Fosdick *v.* Gooding, 412.
 Fosdick *v.* Schale, 37.
 Foster's Appeal, 26, 1398.
 Foster *v.* Browning, 160.
 Foster *v.* Crenshaw, 719.
 Foster *v.* Joice, 192.
 Foster *v.* Lord Romney, 356.
 Foster *v.* Marshall, 285.
 Foster *v.* Peyser, 478, 498.
 Foster *v.* Robinson, 59.
 Foster *v.* Smith, 941.
 Foster *v.* Trustees, 572.
 Foster *v.* Wright, 1089.
 Fothergill *v.* Fothergill, 1494, 1496.
 Fowell *v.* Forest, 726.
 Fowle *v.* Freeman, 1423.
 Fowler *v.* Duhme, 910.
 Fowler *v.* Shearer, 363.
 Fowlkes *v.* Wagoner, 660.
 Fox *v.* Hale, 1331.
 Fox *v.* Mackreth, 606, 1182.
 Fox *v.* Rootes, 782, 1599.
 Fox *v.* Rumery, 864.
 Fox *v.* Union Sugar Refinery, 133.

[References to pages]

- Francis v. Cockrell*, 473.
Francis v. Francis, 1078.
Francis v. Kline, 571.
Francis v. Schoelkopf, 152.
Francks v. Whitaker, 865.
Frank v. Duchesse de Pienne, 1164.
Frank v. Frank, 1240, 1242.
Frank v. Morris, 577, 1531.
Franklin v. Brown, 477.
Franklin v. Osgood, 1460, 1479.
Franks v. Cravens, 34, 45.
Frazier v. Brown, 1147.
Frazier v. Frazier, 927, 928, 1407, 1492.
Frazier v. Hendren, 762.
Frederick v. Frederick, 221.
Freedom v. Norris, 1090.
Freeman v. Bellegarde, 1256.
Freeman v. Butters, 1461, 1462, 1463.
Freeman v. Eacho, 1484, 1494.
Freeman v. Foster, 1224.
Freeman v. Freeman, 663.
Freeman v. Headley, 454.
Freeman v. Prendergast, 1480.
Freeman v. West, 441.
French v. Bankhead, 74.
French v. Com., 1102.
French v. French, 1378.
French v. Lord, 371.
French v. Loyal Co., 584, 794, 1585, 1593, 1594.
French v. Old South Soc., 901.
French v. Pearce, 1113, 1114.
French v. Quincy, 201, 662.
French v. Rollins, 246.
French v. Spencer, 1506, 1507.
French v. Townes, 1300, 1301, 1575, 1577.
French v. Vradenburg, 719.
French v. Williams, 115, 116, 117.
Frewen v. Relfe, 987.
Friedlander v. Ryder, 47.
Fritsch v. Klansing, 1498.
Frogmorton v. Holyday, 921.
Frontin v. Small, 1195.
Fronty v. Godard, 1464.
Frost v. Courtis, 1107.
Frost v. Peacock, 337.
Fry v. Payne, 981, 999, 1010, 1028.
Fry v. Stowers, 1114, 1119, 1122, 1128, 1311.
Frye v. Bank of Illinois, 702.
Fugate v. Honaker, 600.
Fugate v. Pierce, 406.
Fuhr v. Dean, 120, 164.
Fulkerson v. Taylor, 768, 773, 781, 1580, 1588, 1590.
Fuller v. Conrad, 304, 404, 416.
Fulmer v. Williams, 73.
Fulper v. Fulper, 990.
Funk v. Haldeman, 64, 78, 87, 94.
Funk v. McReynold, 724.
Funk v. Paul, 1588.
Funk v. Voneida, 1223, 1224.
Gable v. Wetherholt, 481.
Gaffield v. Hapgood, 43, 46.
Gaffney v. Hicks, 728.
Gage v. Davis, 1540.
Gage v. Gage, 1107.
Gage v. Kaufman, 1545.
Gage v. Stewart, 1539.
Gage v. Ward, 312.
Gaines v. Gaines, 310.
Gaines v. Green Pond Iron Min. Co., 524, 525.
Gaines v. Merryman, 132, 1511, 1513, 1514.
Gaines v. Poor, 1216.
Gainsford v. Dunn, 1464.
Galbraith v. Gedge, 26, 314.
Gallagher v. Dodge, 151.
Gallagher v. Shipley, 41, 42.
Gallego v. Attorney General, 612, 613, 1174, 1371.
Galveston v. Williams, 140.
Gambell v. Trippe, 1480.

[References to pages]

- Gamble's Succession, 157.
 Garnett *v.* Albree, 645.
 Gannon *v.* Hargadon, 155.
 Gano *v.* Nanderveer, 482, 498.
 Garbut *v.* Hilton, 656, 658.
 Gardiner *v.* Derring, 523.
 Gardiner *v.* Guild, 888.
 Gardner *v.* Gardner, 1365, 1369, 1395.
 Gardner *v.* Greene, 315.
 Gardner *v.* Keteltas, 482, 1228.
 Gardner *v.* Newburgh, 67.
 Garland *v.* Garland, 579, 666, 667.
 Garland *v.* Harrison, 1066, 1077.
 Garland *v.* Loving, 1159.
 Garland *v.* Lynch, 789.
 Garland *v.* Richeson, 722.
 Garland *v.* Rives, 1284, 1288.
 Garnett *v.* Macon, 1443.
 Garnons *v.* Knight, 1192.
 Garnsey *v.* Rogers, 728.
 Garrard *v.* Lord Lauderdale, 1242.
 Garrard *v.* Luck, 580.
 Garrett *v.* Christopher, 1331.
 Garrett *v.* Clark, 468.
 Garrett *v.* Ramsey, 1120.
 Garrett *v.* Weinberg, 1107.
 Garries *v.* Green Pond Min. Co., 340.
 Garrison *v.* Hale, 538.
 Garrison *v.* Rudd, 115.
 Garth *v.* Cotton, 537.
 Garton *v.* Bates, 417.
 Gatewood *v.* New York Cent. & Hudson River R. Co., 66, 67.
 Gaskell *v.* Gaskell, 596.
 Gaskill *v.* Sine, 730.
 Gaskins *v.* Finch, 1484, 1496.
 Gate City *v.* Richmond, 1510.
 Gatenby *v.* Morgan, 923.
 Gates *v.* Lawson, 1521, 1545.
 Gates *v.* Seibert, 931.
 Gatewood *v.* Burrus, 1262.
 Gatewood *v.* Gatewood, 278, 336, 698, 789.
 Gatewood *v.* Goode, 781, 1574.
 Gaw *v.* Huffman, 401, 1300, 1301.
 Gawtreay *v.* Leland, 156.
 Gay *v.* Hancock, 601, 749, 753.
 Gayheart *v.* Cornett, 1115.
 Gearheart *v.* Thorp, 1202.
 Geary *v.* Physic, 1200.
 Gehlen *v.* Knord, 66.
 Geiger *v.* Blackley, 1166.
 Geil *v.* Geil, 364, 369, 1569.
 Gelett *v.* Ridge, 1194.
 General Electric Co. *v.* Transit, etc., Co., 31, 34.
 Genesee Chief *v.* Fitzhugh, 71.
 Genet *v.* Hunt, 1472.
 George *v.* Andrews, 727.
 George *v.* Bates, 1249.
 George *v.* Putney, 481.
 George *v.* Richardson, 1454.
 George *v.* Wood, 730.
 Georgia Southern R. Co. *v.* Reeves, 1217.
 Gerber's Estate, 935.
 Gerenger *v.* Summers, 1142.
 Gerrish *v.* Clough, 1090.
 Gibbons *v.* Cannt, 1019.
 Gibbons *v.* Jackson, 1439, 1440.
 Gibbs *v.* Estey, 44, 45.
 Gibbs *v.* Marsh, 1479.
 Gibson *v.* Chouteau, 1101, 1507.
 Gibson *v.* Crehore, 338, 401.
 Gibson *v.* Gibson, 1370, 1378.
 Gibson *v.* Green, 679.
 Gibson *v.* Herriott, 1508.
 Gibson *v.* Holden, 510, 511.
 Gibson *v.* Jones, 749, 756.
 Gifford *v.* Corrigan, 727.
 Gifford *v.* Hort, 596.
 Gilbert *v.* Lawrence, 566, 571.
 Gilbert *v.* Sanderson, 727.
 Gilchrist *v.* Gough, 1588.
 Gildersleeve *v.* Hammond, 146.

[References to pages]

- Giles v. Baramore, 715.
 Giles v. Simonds, 161, 163, 168, 169.
 Gilham v. Madison County R. Co., 155.
 Gill v. Bicknell, 1425.
 Gill v. DeArmant, 31, 34.
 Gill v. Middleton, 474.
 Gillenwaters v. Campbell, 1158.
 Gillespie v. Bailey, 1157.
 Gillespie v. Moon, 1301.
 Gilliam v. Moore, 311, 312, 403.
 Gilliam v. Perkinson, 1248.
 Gillis v. Brown, 315.
 Gillis v. Gillis, 1386.
 Gillis v. Nelson, 143.
 Gilman v. Bell, 1462.
 Gilman v. Hoare, 436.
 Gilman v. Philadelphia, 72.
 Gilman v. Ryan, 798.
 Gilman v. Wills, 62.
 Gilmer v. Mobile & M. Ry. Co., 1217.
 Gilmore v. Driscoll, 144, 146, 1146.
 Gilmore v. Hamilton, 455.
 Gilmore v. Severn, 221.
 Gingrat v. Gas Light Co., 1487.
 Ginter v. Breeden, 766.
 Gish v. Moomaw, 1225.
 Gittings v. Morale, 1111.
 Given v. Hilton, 24.
 Glasgow v. Mathews, 1512, 1514.
 Glasscock v. Smither, 1396.
 Glassell v. Thomas, 1302, 1303.
 Gleason v. Va. Mid. R. Co., 70.
 Glen Mfg. Co. v. Weston Lumber Co., 1115.
 Glendenning v. Bell, 1596.
 Glenn v. Augusta Perpet. B. & L. Co., 594, 1251, 1257, 1258.
 Glenn v. West, 1521, 1544.
 Glickauf v. Maurer, 474.
 Glidden v. Bennett, 38.
 Glidden v. Blodgett, 888.
 Glidden v. Chase, 1528.
 Glover v. Stillson, 869.
 Glauckauf v. Reed, 1509.
 Goddard's Case, 1237.
 Goddin v. Vaughn, 1437, 1441, 1443.
 Godfrey v. Alton, 1511.
 Godfrey v. Dixon, 1076, 1081.
 Godfrey v. Humphrey, 195.
 Godolphin v. Abingdon, 841.
 Godolphin v. Godolphin, 1460.
 Goff v. Anderson, 283.
 Going v. Emery, 1473.
 Goldsborough v. Martin, 921, 930.
 Gooch's Case, 1282.
 Goodall v. Godfrey, 129.
 Goodburn v. Stevens, 314.
 Goodenow v. Eiver, 114.
 Goodman v. Railway Co., 36.
 Goodrich v. Burbank, 115.
 Goodrich v. Harding, 963.
 Goodrich v. Jones, 42, 45.
 Goodright v. Cator, 632.
 Goodright v. Cordivent, 470.
 Goodright v. Cornish, 864, 947.
 Goodright v. Glazier, 1406.
 Goodright v. Goodridge, 223.
 Goodright v. Harwood, 1396.
 Goodright v. Parker, 832.
 Goodson v. Brothers, 1111.
 Goodspeed v. Fuller, 1262.
 Goodtitle v. Bailey, 1506.
 Goodtitle v. Billington, 918.
 Goodtitle v. Holdfast, 670.
 Goodtitle v. Southern, 1251.
 Goodtitle v. Way, 444.
 Goodtitle v. Welford, 1386.
 Goodwin v. Mass. Loan & Trust Co., 1588.
 Goodwin v. Richardson, 706.
 Gorbell v. Davison, 838.
 Gordon v. Frazier, 1308.
 Gordon v. Gordon, 948, 1466.
 Gordon v. Levi, 884.
 Gordon v. Rixey, 675, 676, 758, 761, 763, 775, 778, 780, 782, 1585.

[References to pages]

- Gordon *v.* Whitlock 1377, 1396.
 Gore *v.* Gibson, 1160, 1161.
 Gore *v.* Gore, 921, 930.
 Gore *v.* Knight, 1166.
 Gore *v.* Lawson, 1101.
 Gore *v.* Townsend, 345.
 Goring *v.* Nash, 1294, 1295.
 Gorman *v.* Salisbury, 1457.
 Gorton *v.* Hadsell, 158.
 Gosden *v.* Tucker, 1298.
 Goshorn *v.* Steward, 500.
 Gosling *v.* Warburton, 391.
 Gosson *v.* Ladd, 1479, 1480.
 Gott *v.* Gandy, 467.
 Gould *v.* Boston Duck Co. 66, 70.
 Gould *v.* Carr, 1105.
 Gould *v.* Land, 198.
 Gould *v.* Lynde, 1261.
 Gould *v.* Mather, 1482.
 Gould *v.* Thompson, 454.
 Gourdin *v.* Deas, 839.
 Gove *v.* Cather, 373.
 Gover *v.* Chamberlain, 1238.
 Gowen *v.* Philadelphia Exchange Co., 163.
 Gower *v.* Eyre, 523.
 Gowlett *v.* Hansforth, 669.
 Grace Church *v.* Dobbins, 131.
 Graeff *v.* De Turk, 1463, 1464.
 Graeme *v.* Cullen, 252.
 Grafton *v.* Moir, 123, 1204.
 Graham *v.* Austin, 604.
 Graham *v.* Burch, 1393.
 Graham *v.* Call, 1435.
 Graham *v.* Graham, 1011, 1032.
 Graham *v.* Hendren, 1301.
 Graham *v.* Pancoast, 1440.
 Graham *v.* Pierce, 1000, 1032.
 Graham *v.* Woodson, 451.
 Grandona *v.* Lovdal, 22.
 Grange *v.* Tining, 1500.
 Grant *v.* Lynam, 1487.
 Grant *v.* Ramsey, 435.
 Grantham *v.* Hawley, 61.
 Grantham *v.* Lucas, 782, 1599.
 Grantland *v.* Wight, 1447.
 Graves *v.* Berdan, 145, 495.
 Graves *v.* Dolphin, 665, 666.
 Graves *v.* Smith, 147.
 Graves *v.* Trueblood, 273.
 Graves *v.* Weld, 54, 56.
 Gray *v.* Bailey, 992.
 Gray *v.* Blanchard, 645, 668.
 Gray *v.* Lynch, 1461, 1481.
 Gray *v.* McWilliams, 155.
 Graybill *v.* Brugh, 376, 377, 1437, 1455.
 Graysbrook *v.* Fox, 1411.
 Grayson *v.* Atkinson, 1380.
 Grayson *v.* Richard, 1306, 1310, 1335.
 Great Falls Co. *v.* Worster, 1595.
 Greatrex *v.* Hayward, 1147.
 Greber *v.* Kleekner, 451.
 Gree *v.* Rolle, 1130.
 Green's Case, 646.
 Green *v.* Armstrong, 51.
 Green *v.* Claiborne, 368, 1169, 1201.
 Green *v.* Cole, 534, 536, 540, 541.
 Green *v.* Crain, 1387, 1388.
 Green *v.* Green, 1157.
 Green *v.* Hart, 720.
 Green *v.* Hewitt, 887.
 Green *v.* James, 517.
 Green *v.* King, 973.
 Green *v.* Liter, 1119, 1121.
 Green *v.* Pennington, 1101, 1119, 1120, 1121, 1122, 1123, 1124, 1129, 1144, 1255, 1256.
 Green *v.* Phillips, 33, 38, 39, 40, 44, 45.
 Green *v.* Price, 739.
 Green *v.* Putnam, 64.
 Green *v.* Skipwith, 1200.
 Green *v.* Stone, 727.
 Green *v.* Ward, 1517.
 Green *v.* Watkins, 1119.
 Green *v.* Wheeler, 1527.

[References to pages]

- Greenby v. Wilcocks*, 1220, 1229.
Greene v. Anglemire, 1113.
Greene v. Williams, 1547.
Greenhow v. James, 1078, 1079.
Greenland v. Waddell, 24.
Greenleaf v. Francis, 77.
Greenough v. Turner, 1201.
Greenough v. Welles, 1477, 1479.
Greenwood v. Coleman, 1159.
Greer v. Greer, 1153, 1267, 1269, 1270, 1368.
Greer v. Mitchell, 1505.
Greer v. Van Meter, 129, 131.
Greer v. Wright, 1277, 1278.
Gregg v. Sloan, 793.
Gregor v. Cady, 479.
Gregory v. Frayser, 1160.
Gregory v. People, 1210, 1233, 1234, 1266, 1505, 1506.
Gregory v. Winston, 350, 1273.
Greiner v. Klein, 345.
Greneley's Case, 284, 285.
Gresham v. Gresham, 938.
Grey v. Cuthbertson, 511, 516.
Grice v. Scarborough, 1225.
Griffin v. Cunningham, 1443.
Griffin v. Ellrs, 1549.
Griffin v. Kniseley, 445, 464.
Griffin v. Macaulay, 604.
Griffin v. New Jersey Oil Co., 701.
Griffith v. Kniseley, 445, 464.
Griffith v. Reynolds, 1161.
Griffith v. Spratley, 1272.
Griffith v. Thomson, 938, 939.
Griffith v. Young, 1421.
Grigby v. Cox, 1166, 1167.
Grigg v. Landis, 646.
Griggsby v. Hair, 724.
Griggsby v. Osborn, 773, 1427, 1431, 1583.
Grim's Appeal, 391.
Grim v. Byrd, 1266.
Grimes v. Sanders, 1440.
Grimley v. Davidson, 148.
Grimmer v. Friederich, 830.
Grissom v. Hill, 201, 662.
Grist v. Hodges, 1228, 1229.
Grogan v. Garrison, 387, 388.
Gross v. Criss, 60, 302, 1136.
Grossom v. McFarran, 891.
Grove v. Grove, 1025, 1027.
Grove v. Zumbro, 364.
Groves v. Cox, 922.
Grubb v. Burford, 541.
Grubb v. Grubb, 64, 88.
Grubb v. Wysor, 789.
Grube v. Wells, 1113.
Guarantee, etc., Co. v. Jones, 1487.
Guernsey v. Lazear, 666.
Guerrant v. Anderson, 732, 739, 1582.
Guest v. Reynolds, 151.
Guffey v. O'Reilley, 1508.
Guild v. Richards, 646.
Guion v. Anderson, 283, 285.
Gullivar v. Wicket, 914.
Gunning v. Carman, 256.
Gunson v. Healy, 137, 138.
Gunterman v. People, 83.
Gurnee v. Johnson, 740, 741, 782, 1584.
Guthrie v. Jones, 40.
Guthrie v. Owen, 397.
Guthrie v. Russell, 1232.
Gutman v. Buckler, 1481.
Gwathmey v. Ragland, 720, 724, 725.
Gwynn v. Jones, 463.
Gwynne v. Cincinnati, 347, 1115.
Haeveler v. Fleming, 508.
Haffey v. Birchett, 766.
Haflick v. Stober, 47.
Hafner v. Irwin, 1203.
Hagan v. Campbell, 1089, 1092.
Hagan v. Varney, 252.
Hagerty v. Lee, 1204.
Hague v. Wheeler, 79.

[References to pages]

- Hahn v. Baker Lodge*, 134.
Hahn v. Hutchinson, 661, 666.
Haigh, Ex parte, 1433.
Hail v. Reed, 79.
Hairston v. Doe, Ex dem. Randolph, 364.
Hale v. Hale, 1416, 1426, 1488.
Hale v. Horne, 581, 708.
Hale v. James, 404, 405.
Hale v. McLea, 76.
Hale v. Plummer, 27.
Hale v. Wilkinson, 1200, 1453, 1454.
Haley's v. Williams, 582, 684, 782, 1599.
Hall v. Cazanove, 440.
Hall v. Dean, 1223.
Hall v. Hall, 912, 932.
Hall v. La France Fire Engine Co., 837.
Hall v. Lawrence, 88, 89, 95.
Hall v. Lund, 124.
Hall v. McLeod, 126, 1511.
Hall v. Myers, 464.
Hall v. Palmer, 1474.
Hall v. Priest, 869.
Hall v. Smith, 848.
Hall v. Stephens, 991.
Hall v. Wallace, 454.
Hall v. Warren, 921.
Hallette v. Thompson, 666.
Halligan v. Wade, 508.
Hallister v. Shaw, 1488.
Halsey v. Goddard, 934.
Halsey v. Monteiro, 605.
Halsey v. Peters, 773, 1427, 1431, 1432.
Ham v. Kendall, 36.
Hamer v. Knowles, 146.
Hamilton v. Feary, 477.
Hamilton v. Hughes, 333.
Hamilton v. Ins. Co., 1497.
Hamilton v. Russel, 1274.
Hamilton v. Steele, 573.
Hamlett v. Hamlett, 221, 839.
Hamlin v. Hamlin, 332.
Hamlin v. Thomas, 1489.
Hammond v. Port Royal & A. Ry. Co., 668.
Hammond v. Schiff, 121.
Hammond v. Thompson, 491.
Hammond v. Woodman, 143.
Hampton v. Holman, 220.
Handley v. Anthony, 74.
Haney v. Breeden, 181, 581, 1114, 1311, 1509.
Hanks v. Price, 258, 483.
Hanna v. Wilson, 569, 679, 695, 715, 716, 760, 763, 766.
Hannah v. Boyd, 601.
Hannan v. Osborn, 839.
Hanney v. McEntire, 539.
Hannibal v. Draper, 1510.
Hannon v. Hannah, 976, 978, 1009, 1028, 1575, 1577.
Hannon v. Hounihan, 400, 572, 1106.
Hanrick v. Patrick, 1507.
Hansbrough v. Hooe, 1022.
Hansen v. Meyer, 511.
Hansford v. Elliott, 830, 911.
Hanson v. McCue, 1147.
Harcum v. Hudnall, 24.
Hard v. Wadham, 644.
Hardaker v. Morehouse, 1500.
Hardaway v. Jones, 1250.
Hardenburg v. Hardenburgh, 989, 990.
Hardin v. Hardin, 1201.
Harding v. Glyn, 1490.
Hardman v. Orr, 573.
Hardy v. Galloway, 659.
Hardy v. McCullough, 117, 127.
Hardy v. Memphis, 1514.
Hare v. Carnatt, 1540.
Hargrave v. King, 504.
Harkins v. Forsyth, 364, 710, 1566.
Harkness v. Sears, 41, 44, 48.
Harle v. McCoy, 459.

[References to pages]

- Harlow *v.* Lake Superior Iron Co., 87, 94.
 Harman *v.* Oberdorfer, 729, 731, 785, 786, 787, 788, 1280, 1586.
 Harman *v.* Ratliff, 1109, 1119, 1121, 1123, 1124.
 Harman *v.* Stearns, 1325, 1327, 1328, 1330, 1332, 1536.
 Harmon *v.* Harmon, 163.
 Harmood *v.* Oglander, 1131.
 Harnett *v.* Maitland, 534, 540.
 Harnett *v.* Yielding, 1455.
 Harnsberger *v.* Geiger, 1308.
 Harper *v.* Clayton, 396.
 Harper *v.* Harper, 1276.
 Harper *v.* Vaughan, 254, 403.
 Harrell *v.* Houston, 1115.
 Harrell *v.* Miller, 51.
 Harrer *v.* Wallner, 993.
 Harrington *v.* Watson, 496.
 Harrington *v.* Worcester, 1542.
 Harris' Appeal, 1023.
 Harris *v.* Carson, 57, 59, 60, 302, 448, 1136.
 Harris *v.* Com., 1513.
 Harris *v.* Elliott, 573.
 Harris *v.* Frank, 516.
 Harris *v.* Frink, 54, 454,
 Harris *v.* Harris, 264, 305, 1276, 1278, 1398.
 Harris *v.* Harris' Ex., 749.
 Harris *v.* Miller, 120.
 Harris *v.* Ryding, 145.
 Harris *v.* Scovel, 34, 45.
 Harris *v.* Thomas, 527, 528.
 Harrison *v.* Allen, 1374.
 Harrison *v.* Burgess, 1381.
 Harrison *v.* Carroll, 1298.
 Harrison *v.* Foreman, 830.
 Harrison *v.* Harrison, 609, 1380, 1434.
 Harrison *v.* Jackson, 1194.
 Harrison *v.* Manson, 598, 605.
 Harrison *v.* Middleton, 455, 466, 1235.
 Harrison *v.* Moore, 251.
 Harrison *v.* Payne, 414.
 Harrison *v.* Phillips' Academy, 1243.
 Harrison *v.* Simons, 1201.
 Harrison *v.* Thomas, 1523, 1535, 1539.
 Harrisonburg Co. *v.* Nat. Fur. Co., 1285.
 Harrod *v.* Myers, 1157, 1158.
 Hart *v.* Burch, 395.
 Hart *v.* Haynes, 1584.
 Hart *v.* McCollum, 397.
 Hart *v.* Windson, 435.
 Hartford *v.* Brady, 149.
 Hartford *v.* Railway Co., 1514.
 Hartford & S. Ore. Co. *v.* Miller, 64.
 Hartman *v.* Strickler, 1365, 1369.
 Hartung *v.* Witte, 1115, 1217.
 Hartwell *v.* Camman, 63.
 Harvey *v.* Alexander, 787, 1262, 1298, 1348, 1559.
 Harvey *v.* Bridges, 463.
 Harvey *v.* Peck, 1160, 1161, 1169, 1269.
 Harvey *v.* Steptoe, 748.
 Harvey *v.* Walters, 137.
 Harwood *v.* Benton, 1223.
 Harwood *v.* Goodright, 1374.
 Harwood *v.* Kirby, 1029.
 Harwood *v.* Tompkins, 151.
 Harwood *v.* Tooke, 1457.
 Haskin Wood Vulcanizing Co. *v.* Cleveland Ship Building Co., 797.
 Hassell *v.* Gowthwaite, 241, 1085, 1086.
 Hassler *v.* King, 1570, 1574.
 Hatch *v.* Bluck, 223.
 Hatch *v.* Crawford, 1239.
 Hatch *v.* Palmer, 338, 402.
 Hatch *v.* Straight, 1021.
 Hatcher *v.* Fineaux, 1118.
 Hatcher *v.* Hatcher, 760.
 Hatchett *v.* Hatchett, 1463, 1464.

[References to pages]

- Hatfield *v.* Sneden, 293.
 Hatfield *v.* Thorp, 1386.
 Hatter *v.* Ash, 441.
 Haugh's Appeal, 78.
 Hauser *v.* King, 1463.
 Haven *v.* Grand Junction R. Co., 1237.
 Haven *v.* Wakefield, 445.
 Haverstick *v.* Sipe, 1148.
 Hawke *v.* Enyart, 653.
 Hawkins *v.* Ball, 1417.
 Hawkins *v.* Bohling, 910.
 Hawkins *v.* Chapman, 198.
 Hawkins *v.* Skegg, 56, 60.
 Hawley *v.* Bradford, 338, 345, 346, 374.
 Hawley *v.* Clowes, 539.
 Hawley *v.* James, 333.
 Hawley *v.* Twyman, 365.
 Hawlins *v.* Shipham, 140, 160, 166, 168.
 Hawpe *v.* Bumgardner, 50, 341, 342.
 Haworth *v.* Herbert, 360.
 Haxall *v.* Shippen, 253.
 Hay *v.* Mayer, 289, 293.
 Hayden *v.* Foster, 1526.
 Hayden *v.* Stone, 1511, 1513.
 Hayes *v.* Bowman, 73, 75, 1088.
 Hayes *v.* Foorde, 844.
 Hayes *v.* Goode, 1481.
 Hayes *v.* Kershaw, 1295.
 Hayes *v.* Livingston, 1509.
 Hayes *v.* Waldron, 67, 69.
 Hayes *v.* Waverley & P. Ry., 1215.
 Hayner *v.* Smith, 507.
 Haynes *v.* Boardman, 1106.
 Haynes *v.* Bcylan, 1242.
 Hays *v.* Doane, 44.
 Hays *v.* Heatherly, 1532.
 Hays *v.* Wood, 574.
 Hayward *v.* Kinney, 244.
 Haywood *v.* Brunswick Permanent Benefit Building Soc., 1214.
 Hazeltine *v.* Case, 69.
 Hazelton *v.* Putnam, 22, 114.
 Hazlett *v.* Sinclair, 1217.
 Hazlewood *v.* Forrer, 1156, 1284, 1285.
 Head *v.* Egerton, 735.
 Headrick *v.* McDowell, 1016, 1018, 1021, 1067, 1270, 1456, 1457.
 Heald *v.* Heald, 921, 930.
 Healy *v.* Rowan, 364.
 Heard *v.* Brooklyn, 1514.
 Heard *v.* Fairbanks, 53.
 Heard *v.* Reade, 1498.
 Hearle *v.* Greenbank, 277, 1167.
 Hearne *v.* Lewis, 491.
 Heartt *v.* Kruger, 132, 134.
 Heath *v.* Randall, 161, 163, 168.
 Heath *v.* White, 276, 283, 284.
 Heath *v.* Williams, 67, 70.
 Heavilon *v.* Heavilon, 52.
 Hebbard *v.* Haughran, 1262.
 Hecht *v.* Dettman, 53.
 Heckert *v.* Hills, 1078.
 Heed *v.* Ford, 333.
 Heflin *v.* Bingham, 49, 122, 164.
 Heilbron *v.* Fowler Switch Canal Co., 68.
 Heintze *v.* Bentley, 701.
 Heisen *v.* Heisen, 395.
 Heiskell *v.* Trout, 568.
 Heister *v.* Green, 761.
 Helm *v.* Helm, 410.
 Helm *v.* Wagner, 1522.
 Helm *v.* Wilson, 1115.
 Helurg *v.* Jordan, 473.
 Hemhauser *v.* Decker, 1465.
 Hemingway *v.* Scales, 973.
 Hemphill *v.* Flynn, 461.
 Hemphill *v.* Giles, 466.
 Hemphill *v.* Pry, 1466.
 Henderson *v.* Blackburn, 1474.
 Henderson *v.* Hudson, 565, 1420, 1427.
 Henderson *v.* Hunton, 1156, 1267, 1284, 1294, 1298.
 Henderson *v.* White, 1549.

[References to pages]

- Hendricks *v.* Stark, 147.
 Hendrix *v.* McBeth, 340.
 Hendrixon *v.* Cardwell, 57.
 Henkle *v.* Assurance Co., 1301.
 Henkles *v.* Allstadt, 785.
 Henley *v.* Cottrell Real Estate Insurance & Loan Co., 1427, 1428, 1429, 1430.
 Henretta *v.* Booth, 439.
 Henry *v.* Carson, 1101.
 Henry *v.* Davis, 683.
 Henry *v.* Koch, 129.
 Henry *v.* Raiman, 1262.
 Hensley *v.* Brodie, 34, 45.
 Hensloe's Case, 1411.
 Hepburn *v.* Dundas, 1066, 1077.
 Herlakenden's Case, 39, 44, 45.
 Hermitage *v.* Tompkins, 436.
 Heron *v.* Bank of U. S., 1557.
 Heron *v.* Hoffner, 1483.
 Herring *v.* Wickham, 1283, 1284, 1294, 1295.
 Hershey *v.* Metzgar, 49.
 Hess *v.* Gale, 374.
 Hester *v.* Mullen, 464, 466.
 Heth *v.* Cocke, 278, 335, 336, 392, 401, 419.
 Heth *v.* Radford, City of, 1519.
 Heth *v.* Richmond, F. & P. R. Co., 575, 579, 583.
 Hext *v.* Gill, 539.
 Heywood *v.* Covington, 713.
 Hick *v.* Mors, 1393.
 Hickey *v.* Lake & M. S. Ry. Co., 1217.
 Hickman *v.* Link, 1106.
 Hickman *v.* Trout, 1266, 1284, 1285, 1286.
 Hickok *v.* Hine, 71.
 Hicks *v.* Goode, 1245, 1247.
 Hicks *v.* Riddick, 1432.
 Hicks *v.* Roanoke Brick Co., 805.
 Hicks *v.* Ward, 1462, 1465.
 Hickson *v.* Rucker, 714.
 Hiern *v.* Mills, 1433, 1593, 1595.
 Higgenbotham *v.* Cornwell, 379.
 Higgenbotham *v.* Holme, 877.
 Higgenbotham *v.* Rucker, 938.
 Higgins *v.* California Petroleum & Asphalt Co., 494.
 Higgins *v.* Carlton, 1386.
 Higgins *v.* Flemington Water Co., 68.
 Higgins *v.* York Bldg. Co., 708.
 Hilbourn *v.* Fogg, 480, 481.
 Hildreth *v.* Googins, 126.
 Hildreth *v.* Thompson, 395.
 Hiles *v.* Fisher, 989, 990, 991, 993.
 Hill *v.* Bell, 1381.
 Hill *v.* Burrow, 223, 956, 963.
 Hill *v.* De Rochemont, 41.
 Hill *v.* Hill, 161.
 Hill *v.* Hustons, 385, 1311.
 Hill *v.* Jones, 1497.
 Hill *v.* Rixey, 739, 741, 782, 1581, 1587, 1599, 1602.
 Hill *v.* Rockingham Bank, 912.
 Hill *v.* Sewald, 37.
 Hill *v.* Timmermeyer, 1540.
 Hill *v.* Tupper, 116.
 Hill *v.* West, 391.
 Hilleary *v.* Hilleary, 395.
 Hills *v.* Metzenroth, 1215.
 Hills *v.* Simonds, 839, 936.
 Hinchliffe *v.* Shea, 346, 371, 392.
 Hincksman *v.* Smith, 1453, 1454.
 Hinde *v.* Chorlton, 157.
 Hindon *v.* Kersey, 1386.
 Hine *v.* Dodd, 1592.
 Hinkle *v.* Hinkle, 387, 388.
 Hinkson *v.* Lees, 888.
 Hinton *v.* Bland, 1028.
 Hinton *v.* Hinton, 308.
 Hintze *v.* Thomas, 513.
 Hirth *v.* Graham, 51.
 Hitchins *v.* Basset, 1396.
 Hitchins *v.* Hitchins, 317.
 Hitner *v.* Ege, 450, 478.

[References to pages]

- Hoag *v.* Seyre, 740.
 Hoagland *v.* Crum, 492.
 Hoback *v.* Kilgore, 1303, 1304.
 Hobbs *v.* Shumate, 1529.
 Hobson *v.* Yancey, 1281.
 Hocker *v.* Hocker, 1378.
 Hockman *v.* Hockman, 777.
 Hockman *v.* McClanahan, 364, 369.
 Hodgkin *v.* Farrington, 165, 167.
 Hodgkin *v.* McVeigh, 1103.
 Hodgson *v.* Gascoigne, 55.
 Hodsden *v.* Lloyd, 1167.
 Hoff *v.* Baum, 470.
 Hoffman *v.* Armstrong, 22.
 Hoffman *v.* Kuhn, 134, 147.
 Hogan *v.* Barry, 1215.
 Hogan *v.* Jaques, 367.
 Hoge *v.* Hoge, 1377.
 Hogsett *v.* Ellis, 459.
 Hoke *v.* Hoke, 1409.
 Holbrook *v.* Chamberlin, 40.
 Holbrook *v.* Young, 456.
 Holden *v.* Wells, 289.
 Holdfast *v.* Downing, 1386.
 Hole *v.* Rittenhouse, 1120.
 Holladay *v.* Marsh, 149.
 Holladay *v.* Willis, 683, 686, 687, 689.
 Holland *v.* Hodgson, 34, 38.
 Holland *v.* Long, 1143.
 Hollen *v.* Runder, 32.
 Hollingsworth *v.* Sherman, 1103, 1105.
 Hollis *v.* Burns, 469.
 Hollis *v.* Pool, 467.
 Holme *v.* Strautman, 1249.
 Holmes *v.* Coghill, 1463.
 Holmes *v.* Goring, 135.
 Holmes *v.* Seely, 125, 126.
 Holmes *v.* Tremper, 41.
 Holms *v.* Seller, 1319.
 Holt's Will, 1386.
 Holt *v.* Hogan, 1497.
 Holt *v.* Wilson, 989.
 Holyoke Co. *v.* Lyman, 84.
 Home *v.* Richards, 73, 1088.
 Honaker *v.* Duff, 201, 202, 222, 237, 244, 666, 942.
 Hood *v.* Haden, 1479, 1484, 1486.
 Hooker *v.* Hooker, 324, 325, 256, 620.
 Hookham *v.* Chambers, 1163.
 Hooper, Ex parte, 1430.
 Hooper *v.* Wilkinson, 154.
 Hooten *v.* Holt, 484.
 Hoover *v.* Calhoun, 1302.
 Hoover *v.* Donnally, 1591.
 Hoover *v.* Neff, 1369.
 Hopewell Mills *v.* Bank, 34, 35, 36.
 Hopkins *v.* Cockerell, 716, 766.
 Hopkins *v.* Grimshaw, 901.
 Hopkins *v.* Hopkins, 563, 907, 949.
 Hopkins *v.* Ward, 580.
 Hopkins *v.* Warner, 727.
 Hopkins Academy *v.* Dickinson, 1091, 1092.
 Hopkinson *v.* Rolt, 701.
 Hopkirk *v.* Randolph, 1298.
 Hoppes *v.* Cheek, 1228.
 Hopson *v.* Fowlkes, 993.
 Hords *v.* Colbert, 1266.
 Horn *v.* Baker, 47.
 Horn *v.* Bank, 36.
 Horn *v.* Bennett, 724.
 Horner *v.* Watson, 64.
 Horsley *v.* Garth, 775, 1560, 1564, 1566.
 Horton *v.* Bond, 788, 1280.
 Horton *v.* Whitaker, 885.
 Horwitz *v.* Norris, 1493.
 Hot Springs, etc., Co. *v.* Revercomb, 71, 72.
 Hotchkiss *v.* Middlekauf, 1194, 1195.
 Hottenstein *v.* Lerch, 1596.
 Houghton *v.* Graybill, 1266.
 Houghton *v.* Hapgood, 278.
 House *v.* Burr, 428.

[References to pages]

- House v. Jackson*, 316, 326.
House v. Metcalf, 473.
Houseman v. Kent, 1547.
Houston v. Laffee, 165.
Houston v. Smith, 315, 316, 420.
Houx v. Batteen, 1201.
Houx v. Seat, 167.
Hovenden v. Lord Annesley, 696, 1131.
Hovey v. Nellis, 251.
Howard v. Carpenter, 461, 1494, 1496.
Howard v. Carusi, 941.
Howard v. Castle, 1441.
Howard v. Duke of Norfolk, 927, 931, 952.
Howard v. Fessenden, 31.
Howard v. Harris, 682, 686, 687, 688, 696, 697, 698, 705, 711, 712, 716, 720.
Howard v. McCall, 742.
Howard v. North, 1249.
Howard v. Priest, 27, 314.
Howard v. Shaw, 459.
Howard Ins. Co. v. Halsey, 730.
Howbert v. Cauthorn, 821, 825, 826, 827, 828, 829, 830, 834, 836, 866, 889, 892.
Howdashed v. Kremming, 1119.
Howe v. Andrews, 78.
Howe v. Batchelder, 51.
Howe v. Hodge, 933.
Howe v. Morse, 930.
Howell v. Barnes, 1482.
Howell v. Schenck, 54, 62.
Howeth v. Anderson, 502.
Howery v. Helms, 606, 607, 1036, 1182, 1269.
Hoxsey v. Hoxsey, 331.
Hoxton v. Griffith, 968.
Hoy v. Holt, 502.
Hoy v. Sterrett, 66.
Hoy v. Varner, 336, 337, 338, 345, 346, 347, 371, 373, 374, 400, 402, 420.
Hoyt v. Jaques, 1465.
Hrouska v. Janke, 1201.
Hubbard v. Goodwin, 582.
Hubbard v. Hubbard, 646.
Huber v. Gazley, 1514.
Huck v. Flentye, 148.
Hudgins v. Lanier, 714.
Huddleston v. Briscoe, 1422.
Hudson v. Barham, 594, 749, 753, 780, 788, 806.
Hudson v. Hudson, 1022, 1463, 1464.
Hudson v. Max Meadows Land and Improvement Co., 1426, 1427, 1428, 1429, 1443.
Hudson v. Revett, 1308.
Hudson Iron Co. v. Stockbridge Iron Co., 1301.
Huey v. VanWie, 1549.
Huff v. Thrash, 981, 990.
Huff v. McCauley, 86, 120, 165.
Huffman v. Starks, 434.
Hugein v. Baseley, 1269.
Hughes v. Bingham, 1511.
Hughes v. Caldwell, 749, 754.
Hughes v. Edwards, 704, 715.
Hughes v. Epling, 1288.
Hughes v. Hughes, 399.
Hughes v. Pickering, 1105, 1107.
Hughes v. Tabb, 586, 591.
Hughes v. Williams, 592.
Hugunin v. Cochrane, 312.
Huguenin v. Courtenay, 25.
Hull v. Culver, 1466.
Hull v. Cunningham, 1303, 1304, 1447.
Hull v. Fields, 1266.
Hull v. Watts, 1445, 1446.
Hulme v. Tenant, 1168.
Hulvey v. Hulvey, 396, 397, 400, 1103, 1106, 1107, 1110, 1112.
Hulwig v. Fenner, 1463.
Humbertson v. Humbertson, 220.
Humble v. Langston, 573.
Hume v. Edwards, 1020.

[References to pages]

- Hume v. Hord*, 1167, 1484.
Humphrey v. Foster, 1202, 1203.
Humphrey v. Pegues, 83.
Humphrey v. Taylem, 1408.
Humphries v. Brogden, 31, 144, 145.
Humphries v. Cousins, 78.
Hunnicut v. Peyton, 1121.
Hunt v. Bay State Iron Co., 36.
Hunt v. Blackburn, 990.
Hunt v. Comstock, 484.
Hunt v. Cope, 507.
Hunt v. Hunt, 1118.
Hunt v. Rousmanier, 691, 1300, 1301, 1461.
Hunt v. Thompson, 510.
Hunt v. Watkins, 254.
Hunt v. Whitworth, 271, 283, 284.
Hunt v. Wickliffe, 1121.
Hunter v. Jones, 390.
Hunter v. Parker, 1195.
Hunter v. Spottswood, 1108, 1144.
Hunter v. Trustees, 1510.
Hunter v. Watson, 1175.
Huntington v. Asher, 86, 88.
Huntington v. Parkhurst, 432.
Hunton v. Wood, 762, 1571, 1574, 1592, 1593.
Hurd v. Curtis, 1214.
Hurley v. Hurley, 1537.
Hurn v. Keller, 252, 793, 794, 1232.
Hurst v. Dulaney, 311, 403.
Hurst v. Hurst, 922.
Hurst v. Leckie, 364, 1288, 1289, 1569, 1570, 1572.
Hurt v. Jones, 1027, 1037.
Husband v. Pollard, 1450.
Hussey v. Ryan, 474.
Husted's Appeal, 404.
Huston v. Cantril, 691, 1283, 1293.
Huston v. Cincinnati & Z. R. Co., 1217.
Huston v. Clarke, 33, 38.
Hutcheson v. Grubbs, 772, 778, 779.
Hutchings v. Commercial Bank of Danville, 279, 281, 501.
Hutchinson v. Carleton, 1201.
Hutchinson v. Maxwell, 579, 582, 658, 659, 661, 663, 665, 666, 667, 877.
Hutchison v. Rust, 1240, 1241, 1242, 1243.
Hutzler v. Phillips, 687.
Huyck v. Andrews, 1222, 1224.
Hyatt v. Griffiths, 461.
Hyatt v. Wood, 461, 463.
Hyatt v. Zion, 372.
Hyde v. Price, 1163.
Hyde v. White, 1467.
Hylton v. Hylton, 1396.
Iaeger v. Bossieux, 337, 403, 701, 725, 805, 807, 808.
Idle v. Cook, 884.
Idley v. Bowen, 1398.
Iggledon v. May, 425, 428.
Illinois Cent. R. Co. v. Illinois, 72.
Inches v. Dickenson, 509.
Inches v. Hill, 830.
Ingalls v. Hobbs, 477.
Ingalls v. Railway Co., 31.
Ingals v. Plamondon, 147.
Inge v. Murphy, 399.
Ingersoll v. Lewis, 1105.
Ingersoll v. Sergeant, 110.
Inglesant v. Inglesant, 1388.
Inglis v. Sailors' Snug Harbor, 612, 936.
Ingraham v. Baldwin, 481.
Ingraham v. Meade, 1463.
Ingram v. Ingram, 1479.
Ingram v. Morris, 400.
Ingram v. Pelham, 740.
Ingram v. Threadgill, 74.
Inman v. Stamp, 432.
Innis v. Jackson, 376, 1455.
Insurance Co. of Valley of Va. v. Barleys, 1014.
Interstate Co. v. Clintwood Co., 22, 23, 63.
Ireland v. Nichols, 647.

[References to pages]

- Irick *v.* Fulton, 1300, 1301, 1302.
 Iron Belt Bldg. & Loan Ass'n *v.* Groves, 1571, 1572.
 Irving *v.* Clark, 839.
 Irvine *v.* Greever, 279, 572, 575.
 Irvine *v.* Irvine, 641, 1157.
 Irwin *v.* Covode, 525.
 Irwin *v.* Dixon, 1512.
 Isett *v.* Lucas, 724.
 Izon *v.* Gorton, 466.

 Jack *v.* Martin, 154.
 Jackman *v.* Arlington Mills, 154, 473.
 Jackson *v.* Aspell, 395.
 Jackson *v.* Babcock, 166.
 Jackson *v.* Bronson, 533.
 Jackson *v.* Brown, 220.
 Jackson *v.* Brownson, 523.
 Jackson *v.* Burchin, 1157.
 Jackson *v.* Carpenter, 1156.
 Jackson *v.* Counts, 1155, 1156.
 Jackson *v.* Cutright, 1430.
 Jackson *v.* Davenport, 1469.
 Jackson *v.* Everett, 836.
 Jackson *v.* Farmer, 463.
 Jackson *v.* French, 621.
 Jackson *v.* Hans, 1283.
 Jackson *v.* Harrison, 504.
 Jackson *v.* Jansen, 1498.
 Jackson *v.* Johnson, 266, 271, 283, 1101.
 Jackson *v.* Kisselbrack, 444.
 Jackson *v.* Kittle, 1533.
 Jackson *v.* Ligon, 1443, 1488, 1489.
 Jackson *v.* Mancius, 246.
 Jackson *v.* Matsdorf, 1021.
 Jackson *v.* Merrill, 195.
 Jackson *v.* Meyers, 1277.
 Jackson *v.* Miller, 454.
 Jackson *v.* Morse, 463.
 Jackson *v.* Noble, 923.
 Jackson *v.* Phillips, 934.
 Jackson *v.* Phipps, 1241, 1243.
 Jackson *v.* Pleasanton, 577.
 Jackson *v.* Richards, 248.
 Jackson *v.* Root, 1201.
 Jackson *v.* Rowland, 481.
 Jackson *v.* Sanders, 1041, 1081.
 Jackson *v.* Schoonmaker, 440.
 Jackson *v.* Sears, 1118.
 Jackson *v.* Shepard, 1522, 1545.
 Jackson *v.* Sublett, 892.
 Jackson *v.* The Magnolia, 71.
 Jackson *v.* Topping, 628, 629.
 Jackson *v.* Turner, 1038.
 Jackson *v.* Vanderheyden, 391, 395.
 Jackson *v.* Vincent, 248.
 Jackson *v.* Walton, 31.
 Jackson *v.* Wells, 195.
 Jackson *v.* Wheeler, 621.
 Jackson *v.* Woodruff, 1120.
 Jacksonville *v.* Lambert, 156.
 Jacob *v.* Howard, 892.
 James *v.* Bird, 1276.
 James *v.* Cochran, 703.
 James *v.* Fields, 335.
 James *v.* Kibler, 428, 429.
 James *v.* McWilliams, 938.
 James *v.* Oades, 682.
 James *v.* Plant, 139.
 James *v.* Upton, 332, 333, 338, 402, 403.
 Jameson *v.* Jameson, 830.
 Jameson *v.* Rixey, 107.
 James River & Kanawha Co. *v.* Thompson, 84.
 Janes *v.* Jenkins, 129, 1224.
 Janney *v.* Barnes, 1289.
 Janney *v.* Stephen, 782, 1599.
 Jarnigan *v.* Maies, 133.
 Jarrett *v.* Johnson, 565.
 Jarrett *v.* Stevens, 1108.
 Jay *v.* Michael, 130.
 Jee *v.* Hudley, 930.
 Jeffer *v.* Gifford, 540.
 Jefferies *v.* Allen, 392.
 Jeffers *v.* Lampson, 889.

[References to pages]

- Jefferson v. Jefferson*, 540.
Jeffrey v. Walton, 1200.
Jenkins v. Fowler, 151.
Jenkins v. Harrison, 376.
Jenkins v. Hopkins, 1223.
Jenkins v. Jenkins, 1201.
Jenkins v. Lykes, 161, 163, 164, 167, 168.
Jenkins v. McCoy, 55.
Jenkins v. Rhodes, 349, 1273, 1369.
Jenks v. Colwell, 36, 37.
Jenks v. Horton, 256.
Jenks v. Williams, 151.
Jenner v. Morgan, 258, 492.
Jennings v. Gravely, 581, 1311.
Jennings v. Moore, 724.
Jennings v. Palmer, 1300.
Jermyn v. Arscot, 946.
Jesse v. Parker, 1383, 1389.
Jesse v. Preston, 1518.
Jesser v. Armentrout, 572.
Jiggetts v. Davis, 219, 955, 960.
John Hancock, etc., Ins. Co. v. Patterson, 131.
Johns v. Fritchey, 1161.
Johns v. Johns, 202.
Johnson v. Archibald, 1255.
Johnson v. Carpenter, 723.
Johnson v. Dunn, 1383, 1387.
Johnson v. Hannahan, 463.
Johnson v. Hubbell, 1391, 1416.
Johnson v. Johnson, 523.
Johnson v. Knott, 72.
Johnson v. Legard, 1295.
Johnson v. Lucas, 1290.
Johnson v. Medlicott, 1160.
Johnson v. Nat. Exch. Bank, 1564, 1592, 1595.
Johnson v. Philips, 545.
Johnson v. Rice, 731.
Johnson v. Sherman, 573.
Johnson v. Shields, 395.
Johnson v. Skillman, 165, 167.
Johnson v. Smith, 256.
Johnson v. Touchet, 1496.
Johnson v. Van Velsor, 391.
Johnson v. Wagner, 1580.
Johnson v. Warren, 659, 668.
Johnson v. Williams, 1331.
Johnson v. Wiseman, 43.
Johnson v. Zink, 729.
Johnston's Estate, 930, 933.
Johnston v. Hargrove, 506, 633.
Johnston v. Jones, 1090.
Johnston v. Slater, 1567, 1568, 1575.
Johnston v. Smith, 370.
Johnston v. Sutton, 1547.
Johnston v. Thompson, 1481.
Johnston v. Virginia C. & I. Co., 1111.
Johnston v. Zanes, 579.
Jollard v. Stainbridge, 1592, 1593.
Joliffe v. Hite, 1445, 1446, 1447.
Jones v. Bragg, 373.
Jones v. Brewer, 408, 409.
Jones v. Carter, 1013, 1014, 1195, 1196, 1305.
Jones v. Caswell, 1441.
Jones v. Clifton, 1462, 1473.
Jones v. Comers, 704, 705.
Jones v. Crawford, 1283.
Jones v. Devore, 347.
Jones v. Dils, 1533, 1544.
Jones v. Gibson, 1526.
Jones v. Guaranty & Indemnity Co., 700.
Jones v. Habersham, 1173.
Jones v. Hobson, 1481.
Jones v. Hubbard, 1436.
Jones v. Hughes, 293, 380, 381, 385.
Jones v. Jones, 272, 279, 282, 454, 539, 1165, 1170, 1240.
Jones v. Lackland, 604.
Jones v. Marcy, 434.
Jones v. Mitchell, 1410.
Jones v. Miracle, 1542.
Jones v. Morgan, 857.
Jones v. Myrick, 729, 778, 783, 792.

[References to pages]

- Jones v. Parker*, 516.
Jones v. Powell, 390.
Jones v. Robinson, 1588.
Jones v. Roe, 950.
Jones v. Smith, 1594, 1595.
Jones v. Tatum, 564, 1446, 1447.
Jones v. Thomas, 1193, 1214.
Jones v. Thorn, 577.
Jones v. Towne, 157.
Jones v. Turberville, 1132.
Jones v. Van Boschove, 136.
Jones v. Westcomb, 921.
Jones v. Willis, 469.
Jordan v. Buena Vista Co., 680, 760, 761.
Jordan v. Eve, 1223.
Jordan v. Hyatt, 1526.
Jordan v. Land, 1143.
Jordan v. Richmond Home, 864.
Jordan v. Universalist Trustees, 613, 614, 1174.
Josslyn v. McCabe, 47.
Joynes v. Statham, 683.
Julian v. Railway Co., 392.
Jull v. Jacobs, 863.
Junk v. Canon, 333.
Jupp v. Buckwell, 990.
Justis v. English, 584.
Jutte v. Hughes, 156.

Kabley v. Worcester Gas Co., 445.
Kane v. Bloodgood, 1108.
Kane v. Mackin, 1241.
Kane v. Mann, 679, 762, 779, 780.
Kane v. O'Connor, 1234.
Kane v. Va. Coal & Iron Co., 1265.
Kauffman v. Griesemer, 155.
Kaufman v. Walker, 1434.
Kay v. Duchesse de Pienne, 1163, 1164.
Kea v. Robeson, 1249.
Kean v. Welch, 1022.
Kearney v. Kearney, 252.
Keating v. Cincinnati, 144, 145.

Keating v. Condon, 509.
Keating v. Springer, 128, 152.
Keats v. Hugo, 128, 156, 1147.
Keckley v. Union Bank of Winchester, 1163.
Keech v. Sandford, 574, 576.
Keefer v. Schwartz, 1487.
Keegan v. Cox, 1158.
Keeler v. Keeler, 39, 46.
Keely v. Sanders, 1524, 1525.
Keen v. Monroe, 1309.
Keffer v. Grayson, 1451.
Kehr v. Snyder, 1090.
Keister v. Keister, 1202, 1203.
Kelley v. Meins, 941.
Kelley v. Whitney, 723.
Kellogg v. Dickenson, 158.
Kellogg v. Malin, 1220, 1224.
Kelly v. Dutch Church, 483.
Kelly v. Fairmount Land Co., 1594.
Kelly v. Henell, 1547, 1549.
Kelly v. Hill, 1203.
Kelly v. Lehigh Min. & Mfg. Co., 694, 735, 738.
Kelly v. Love, 1174, 1370.
Kelly v. McGrath, 349.
Kelly v. Owen, 348.
Kelsey v. Remer, 1222.
Kelso's Appeal, 392.
Kelso v. Blackburn, 1278, 1581.
Kelso v. Kelly, 1544.
Kemeys v. Proctor, 1424.
Kemp's Case, 946.
Kemp v. Com., 1101.
Kemp v. Derrett, 466.
Kemp v. Westhook, 1128.
Kendall v. Hathaway, 37.
Kendall v. Honey, 417.
Kennedy v. Kingston, 1479, 1491.
Kennedy v. Owen, 1217.
Kenner v. American Contract Co., 645.
Kensington, Ex parte, 1433.
Kent v. Kent, 1410.

[References to pages]

- Kent v. Matthews*, 789.
Kent v. Morrison, 1466.
Kent v. Waite, 123.
Kent v. Welch, 498.
Kenworthy v. Schofield, 1421.
Kenyon v. Kenyon, 315.
Keppel v. Bailey, 1217.
Kerin v. Lindley, 1479.
Kerr v. Birnie, 1242.
Kerr v. Day, 570.
Kerr v. Freeman, 1331, 1332.
Kerr v. Kingsbury, 47.
Kerr v. Lunsford, 1367.
Kerr v. Verner, 869.
Kerrison v. Smith, 165.
Ketchum v. Walsworth, 992.
Kevan v. Branch, 1289.
Key v. Hughes, 600.
Key v. Weathersbee, 863.
Keyes v. Wood, 723.
Keyton v. Brawford, 1304, 1445, 1446, 1447.
Kidd v. Alexander, 1574.
Kidney v. Toussmaker, 877.
Kier v. Peterson, 79.
Kilburn v. Adams, 1145.
Kile v. Giebner, 40.
Kille v. Ege, 1242.
Killmore v. Howlett, 52.
Kilpatrick v. Barron, 1489.
Kimball v. Ballard, 1528.
Kimball v. Cochecho R. Co., 125.
Kimball v. Ladd, 1143.
Kimball v. Rowland, 470.
Kimball v. Sattley, 51.
Kimball v. Second Congregational Parish in Rowley, 157, 158.
Kincaid's Appeal, 157, 158.
Kincaid v. McGowan, 63.
Kincheloe v. Tracewell's 631, 1112, 1123.
King v. Adderley, 441.
King v. Cotton, 1450.
King v. Fowler, 62.
King v. Hamilton, 1442.
King v. Hyatt, 1541.
King v. King, 679.
King v. Lord Yarborough, 1088.
King v. Melling, 955.
King v. Mullins, 620.
King v. Murphy, 136.
King v. Newman, 683.
King v. Norfolk & W. R. Co., 623.
King v. Pedley, 473.
King v. Sheffey, 1399.
King v. Smith, 1088, 1247.
King v. Wells, 122.
King v. Wilson, 425, 428.
Kingman v. Harmon, 910.
Kingsbury v. Collins, 54.
Kingsley v. Holbrook, 51.
Kingsley v. McFarland, 30.
Kinlyside v. Thornton, 534, 541.
Kinnaird v. Miller, 612, 936, 1174, 1370.
Kinnersley v. Orpe, 1566.
Kinney v. Beverley, 1104, 1529.
Kinnier v. Woodson, 1296.
Kinsolving v. Pierce, 397.
Kiracofe v. Kiracofe, 281.
Kircudbright v. Kircudbright, 1019, 1020, 1022.
Kirk v. Hamilton, 1508, 1509.
Kirkman v. Jervis, 439.
Kirtland v. Passett, 454.
Kissam v. Dierkes, 1499.
Kister v. Reeser, 123, 1204.
Kitchen v. Pridgen, 466.
Kittaning Academy v. Brown, 1103.
Kitty v. Fitzhugh, 1108, 1144.
Kittredge v. Woods, 42, 49, 52.
Kitzmilller v. Van Renselaer, 373.
Kivett v. McKeithan, 165.
Kleeman v. Frisbie, 723.
Kline v. Kline, 349, 1296.
Kling v. Ballentine, 338.
Klinck v. Price, 683.
Klinkener v. School Directors, 1510.
Klutts v. Klutts, 333.

[References to pages]

- Knapp *v.* Knapp, 1398.
 Kneller *v.* Lang, 1111.
 Knight *v.* Alexander, 1524.
 Knight *v.* Earl of Plymouth, 592.
 Knight *v.* Ellis, 195, 219.
 Knight *v.* Indiana Coal & Iron Co., 455.
 Knight *v.* Oliver, 1019, 1022.
 Knight *v.* Watts, 600, 601.
 Knight *v.* Yarborough, 1463, 1464, 1477, 1485, 1490.
 Knisely *v.* Williams, 569, 679, 695, 760, 763, 766.
 Knox *v.* Peterson, 1532.
 Koen *v.* Bartlett, 524.
 Koiner *v.* Rankin, 1119, 1120, 1121, 1124, 1125.
 Kramer *v.* Carter, 1228.
 Kramer *v.* Cook, 428.
 Krider *v.* Ramsay, 508.
 Kroesen *v.* Seevers, 687, 688.
 Kuecken *v.* Voltz, 123.
 Kutz *v.* McCune, 1224.
 Kyle *v.* Tait, 764, 766.

 Lacey *v.* Davis, 1528, 1544.
 Lackey *v.* Holbrook, 463.
 Lacon *v.* Martin, 1432.
 Lacy *v.* Kynaston, 1344.
 Lacy *v.* Pixler, 1158.
 Lacy *v.* Wilson, 1585.
 Ladd *v.* Boston, 121, 1215.
 Lade *v.* Halford, 946.
 Ladue *v.* Detroit, 701, 702.
 Lady Fry's Case, 356.
 Lafayette R. R. Co. *v.* Adams, 474, 476.
 Lafferty *v.* Milligan, 1222.
 Lagorio *v.* Dozier, 1322, 1323.
 Lagrove *v.* Merle, 1380.
 Lagrove *v.* Rains, 1525, 1542.
 Laguirenne *v.* Dougherty, 466.
 Lake, *In re*, 1549.
 Lamar *v.* Hale, 585, 760, 1262, 1299, 1590, 1594.
 Lamar *v.* Miles, 40.
 Lamar *v.* Scott, 395.
 Lamb *v.* Crosland, 1138, 1140.
 Lamb *v.* Smith, 1302.
 Lambe *v.* Manning, 167.
 Lambert *v.* Cooper, 1383.
 Lambert *v.* Nanny, 1591.
 Lambert *v.* Paine, 195.
 Lambert *v.* Thwaites, 1477, 1478, 1491.
 Lampet's Case, 626, 721.
 Lampman *v.* Milks, 127.
 Lamson *v.* Clarkson, 479, 481.
 Lancashire *v.* Mason, 481.
 Land *v.* Jeffries, 1278.
 Land *v.* Shipp, 337, 338, 346, 347, 366, 370, 371, 373, 374, 379, 380, 381, 388, 389, 390, 402, 403, 407, 1233, 1298.
 Landon *v.* Platt, 38.
 Lane *v.* Debenham, 1481.
 Lane *v.* Dighton, 575.
 Lane *v.* King, 62.
 Lane *v.* Tidball, 594, 601, 689, 748, 749, 751, 753, 754, 756.
 Lane *v.* Vanderburgh, 527.
 Lang *v.* Lee, 1289.
 Lang *v.* Waring, 26.
 Langdon *v.* Stewart, 1542.
 Langley *v.* Baldwin, 955.
 Langley *v.* Chapin, 668, 1530, 1544.
 Lanier *v.* Booth, 1146.
 Lanigan *v.* Kille, 435, 483, 499.
 Lansdowne *v.* Lansdowne, 1301.
 Lansing Iron, etc., Works *v.* Walker, 31.
 Lansing *v.* Smith, 72.
 Lantz *v.* Massie, 596, 821, 825, 831, 835, 840, 890, 891.
 Lapere *v.* Luckey, 22.
 Larne *v.* Hotel Co., 473.
 Larrowe *v.* Beam, 406.
 Lasala *v.* Holbrook, 1148.
 Lassell *v.* Reed, 42.
 Lathrop *v.* Clewis, 101.

[References to pages]

- Laton *v.* Balcom, 1531.
 Lattimer *v.* Livermore, 152.
 Laughlin *v.* Freame, 1201.
 Laughran *v.* Smith, 466.
 Laughter's Case, 650.
 Lawes *v.* Bennett, 570.
 Lawrence's Estate, 921, 928, 930, 1465, 1472.
 Lawrence *v.* Browne, 392.
 Lawrence *v.* Butler, 1437.
 Lawrence *v.* Jenkins, 147.
 Lawrence *v.* Montgomery, 1229.
 Lawrence *v.* Morrison, 1398.
 Lawrence *v.* Smith, 929.
 Lawrence *v.* Springer, 165.
 Lawson *v.* Morrison, 1391, 1393, 1394, 1399, 1401, 1404, 1405, 1406.
 Lawton *v.* Lawton, 48.
 Lawton *v.* Salmon, 48.
 Lawton *v.* Ward, 116.
 Layne *v.* Norris, 1128.
 Lea *v.* Eidson, 1300.
 Lea *v.* Willis, 1296.
 Leach *v.* Duval, 349.
 Leach *v.* Foracy, 377.
 Leach *v.* Jay, 177.
 Leake *v.* Benson, 1168.
 Leake *v.* Ferguson, 778, 780, 789, 1281.
 Leake *v.* Robinson, 934, 935.
 Lean *v.* Schutz, 238, 1163.
 Learned *v.* Cutler, 346, 371.
 Learoyd *v.* Godfrey, 473.
 Leavell *v.* Robinson, 687.
 Leavitt *v.* Lamprey, 320, 368, 395, 417, 1201.
 Leavitt *v.* Leavitt, 454.
 Lechmere, *In re*, 906.
 Lee *v.* Alston, 523.
 Lee *v.* Bank of U. S., 280, 365, 661, 1167, 1298.
 Lee *v.* Bumgardner, 23, 63, 1258.
 Lee *v.* Gansell, 439.
 Lee *v.* Lee, 1364.
 Lee *v.* Lindell, 313, 1035.
 Lee *v.* Monroe, 1266.
 Lee *v.* Muggeridge, 1496.
 Lee *v.* Patillo, 597.
 Lee *v.* Randolph, 754.
 Lee *v.* Risdon, 47.
 Lee *v.* Simpson, 1486.
 Lee *v.* Tapscott, 1567, 1575.
 Leeds *v.* Wakefield, 1499.
 Leffingwell *v.* Warren, 1099.
 Leftwich *v.* Richmond, City of, 1543, 1571.
 Legal *v.* Miller, 1457.
 Leggett *v.* Doremus, 1500.
 Lehigh Valley R. Co. *v.* McFarlan, 1138, 1143.
 Lehndorf *v.* Cope, 244.
 Leigh *v.* Dickson, 1002.
 Leigh *v.* Harrison, 666.
 Leiter *v.* Pike, 516.
 Leland *v.* Adams, 195.
 Leland's Appeal, 376.
 Leman *v.* Whitley, 567.
 Lemayne *v.* Stanley, 1379, 1380.
 Le Neve *v.* Le Neve, 1592, 1593, 1594, 1595, 1596.
 Lench *v.* Lench, 575.
 Lenfers *v.* Henke, 340, 913.
 Lennox *v.* Hendricks, 1115.
 Leonard *v.* Burr, 922.
 Leonard *v.* Clough, 34, 44, 46.
 Leonard *v.* Henderson, 633.
 Leonard *v.* Leonard, 125, 404, 1143.
 Leonard *v.* Lord Sussex, 596.
 Leonard *v.* St. John, 1147.
 Leonard Lovie's Case, 880, 884.
 Leslie *v.* Pound, 413.
 Lester *v.* Foxcraft, 130.
 Lester *v.* Garland, 440, 441.
 Lester *v.* Lester, 1427.
 Lester *v.* Pedigo, 798.
 Lewis *v.* Apperson, 345, 368, 390, 391, 403, 1233, 1506.

[References to pages]

- Lewis v. Caperton*, 569, 695, 760, 766, 767, 1288, 1298.
Lewis v. Christian, 72.
Lewis v. Coons, 1535.
Lewis v. Gainesville, 83.
Lewis v. Jones, 41, 42.
Lewis v. Klotz, 62.
Lewis v. Lee, 1163.
Lewis v. Madison, 1457, 1592.
Lewis v. McGee, 1175.
Lewis v. Ocean, etc., Pier Co., 47.
Lewis v. Overby, 788, 1043, 1110, 1239, 1280, 1293.
Lewis v. Portland, 1511.
Lewis v. Rosler, 45.
Lewis v. Smith, 403.
Lewis v. Stein, 69.
Libby v. Burnham, 1528.
Lide v. Hadley, 117.
Liford's Case, 51, 55, 87, 125.
Liggett Spring & Axle Co.'s Appeal, 1588.
Liggins v. Inge, 140, 160.
Liggon v. Fuqua, 1066, 1069.
Lillibridge v. Coal Co., 23, 63.
Lincoln v. Burrage, 1217.
Lindeman v. Lindsey, 136.
Lindley v. O'Reilly, 1473.
Lindsay v. Springer, 1115.
Lindsay v. Winona & St. P. R. Co., 55.
Lindsey v. Eckels, 222.
Lindsey v. Lindeman, 140.
Lines v. Darden, 1464.
Lingle v. Cook, 742.
Linhart v. Foreman, 1266.
Link v. Doerfer, 1530.
Linkenhoker v. Graybill, 125, 134.
Linthicum v. Ray, 116.
Linton v. Brown, 1241.
Linton v. Hart, 111, 493.
Linton v. Laycock, 830.
Lipscomb v. McClellan, 1118.
Lipsky v. Borgmann, 29.
List v. Hornbrook, 148.
Litchfield v. Preston, 726, 728, 729, 1173, 1181.
Literary Fund v. Dawson, 612, 936, 1174, 1370.
Little's Appeal, 910.
Little v. Bennett, 1493.
Little v. Brown, 459, 759.
Little v. Heaton, 632.
Little v. Pearson, 459.
Little v. Poole, 1264.
Littlefield v. Crocker, 371.
Littlefield v. Getschell, 1230.
Livingston v. Livingston, 715.
Livingston v. McDonald, 155.
Livingston v. Penn. Iron Co., 714.
Livingstone v. Story, 697.
Lloyd v. Branton, 658.
Lobdell v. Hayes, 332.
Lock v. Fulford, 728.
Lock v. Furze, 483, 499.
Locke v. Frasher, 480, 481, 482, 581.
Locke v. James, 1395.
Lockhart v. Vandyke, 1408, 1409.
Lockwood v. Ewer, 690.
Lockwood v. Sturdevant, 1220.
Lockwood Co. v. Lawrence, 69.
Lockyer v. Savage, 877.
Loddington v. Kime, 188, 192, 824, 865.
Lodge v. White, 508.
Loebenthal v. Raleigh, 1466.
Logan v. Gardner, 1157.
Logan v. Moulder, 1229.
Logan v. Simmons, 349.
Logansport v. Humphrey, 1532.
Lomas v. Bailey, 1427.
Lomas v. Wright, 921.
Lomax v. Pendleton, 604, 752.
London v. Riggs, 1205.
London, etc., Ry. Co. v. Gomm, 1214.
Long v. Blackall, 228, 927, 928, 931.
Long v. Buchanan, 161, 163, 168.

[References to pages]

- Long v. Fitzsimmons, 449, 478.
 Long v. Hagerstown Agricultural Implement Mfg. Co., 773, 1432.
 Long v. Meriden Britannia Co., 1289, 1290.
 Long v. Ramsay, 1568.
 Long v. Weller, 1302.
 Longford v. Eyre, 1484.
 Longhead v. Phelps, 934.
 Loomis v. McClintock, 1489.
 Lord Bolton v. Tomlin, 432.
 Lord v. Wormwood, 149.
 Lord Lovelace's Case, 1237.
 Lord Ross v. Whitman, 526.
 Lord Vaux' Case, 356, 357.
 Loughran v. Ross, 47.
 Louisville Banking Co. v. Leonard, 701.
 Louisville & F. R. Co. v. Ballard, 150.
 Louisville & F. R. Co. v. Quinn, 140.
 Lounsberry v. Snyder, 507.
 Love v. Shields, 1103.
 Lovejoy v. Lunt, 1529.
 Lovell v. Frost, 1105.
 Loving v. Blake, 931.
 Loving v. Marsh, 1460.
 Loving v. Norton, 1256.
 Low v. Burron, 928.
 Low v. Elwell, 463.
 Lowe v. Joliffe, 1386.
 Lowe v. Miller, 1318.
 Lowe v. Trundle, 1266, 1267.
 Lowell v. Daniels, 391.
 Lowry v. Fisher, 372.
 Lowry v. Muldrow, 936.
 Loyd v. Loyd, 921, 927, 928, 930, 936.
 Loyd v. Spillet, 1413.
 Lucas v. Brooks, 482.
 Luckett v. Luckett, 1452.
 Lucy v. Tennessee & C. R. Co., 1107.
 Lumbard v. Aldrich, 1249.
 Lusk v. Pelter & Co., 1028, 1108, 1109.
 Lutterloh v. Cedar Keys, 1514.
 Luxford v. Cheeke, 357, 887.
 Lybe's Appeal, 76, 77.
 Lyell v. Williams, 441.
 Lyman v. Hale, 22.
 Lynch v. Allen, 1091.
 Lynch v. Henry, 583.
 Lynchburg Perpet. B. & L. Co. v. Fellers, 1586.
 Lynchburg Trust & Sav. Bank v. Elliott, 791.
 Lynchburg Traction Co. v. Guill, 1511, 1514.
 Lynn's Appeal, 524.
 Lynn v. Gephart, 333.
 Lynn v. Morse, 1536.
 Lyon v. Cunningham, 454.
 Lyon v. Hunt, 1525.
 Lyon v. Parker, 1214.
 Lytle v. Pope, 703.
 Mabary v. Dollarhide, 1105.
 McAlester v. Landers, 482.
 McAllister v. Devane, 135.
 McAllister v. Harman, 1443.
 McArthur v. Scott, 910, 932.
 Macaulay v. Dismal Swamp Co., 342, 343, 523, 525, 533.
 McBride v. McBride, 1378.
 McBride v. Wilkinson, 1495, 1496.
 McCabe v. Bellows, 373, 401.
 McCabe v. Bruere, 1114.
 McCabe v. Swap, 338, 402.
 McCall v. Walter, 40.
 McCallum v. Water Co., 69, 132.
 McCamant v. Nuckolls, 1464.
 McCandlish v. Keen, 759, 1559, 1574, 1581, 1583.
 McCann v. Janes, 377, 1455, 1456.
 McCarthy v. Groff, 799.
 McCarthy v. Nicrosi, 121.

[References to pages]

- McCauley *v.* Grimes, 310, 311.
 McChesney *v.* Browns, 365.
 McClanahan *v.* Porter, 404, 406.
 McClanahan *v.* Siter, 368.
 McCleary *v.* Ellis, 661, 666.
 McClenahan *v.* Gwynn, 498.
 McClintick *v.* Manns, 963, 1027.
 McClintick *v.* Wise, 724, 725, 760, 763.
 McClintock's Appeal, 49.
 McClune *v.* Raben, 1271.
 McClung *v.* Beirne, 729, 779, 783.
 McClure *v.* Harris, 310.
 McClure *v.* Roman, 701.
 McClure *v.* Thistle, 1583.
 McComb *v.* McComb, 840, 888.
 McComb *v.* Wright, 1425.
 McConnell *v.* Blood, 39, 44.
 McConnell *v.* Kibbe, 145.
 McConville *v.* National Valley Bank, 1296.
 McCord *v.* Oakland Quicksilver Min. Co., 524.
 McCormick *v.* Horan, 69.
 McCormick *v.* Taylor, 477.
 McCorry *v.* King, 247, 266, 283.
 McCoy *v.* Herbert, 1419.
 McCoy *v.* McCoy, 1016, 1017, 1018, 1021, 1022, 1037.
 McCraney *v.* McCraney, 264, 345.
 McCrea *v.* Marsh, 161, 165.
 McCrea *v.* Purmort, 1262.
 McCready *v.* Sexton, 1547, 1548, 1549.
 Maccubbin *v.* Cromwell, 337.
 McCulloch *v.* Maryland, 1516.
 McCullough *v.* Aten, 74.
 McCullough *v.* Hunter, 1528, 1540.
 McCullough *v.* Irvine, 48.
 McCullough *v.* Sommerville, 1195.
 McCullough *v.* Wall, 71, 74, 1091.
 McCurdy *v.* O'Rourke, 829.
 McDaniel *v.* Cummings, 155.
 McDaniel *v.* McDaniel, 404.
 McDaniels *v.* Calvin, 701, 702.
 McDearman *v.* Hodnett, 1020, 1021.
 McDevitt *v.* Frantz, 572.
 McDevitt *v.* Lambert, 469.
 McDonald *v.* Aten, 333.
 McDonald *v.* Hurst, 1168.
 Macdonough *v.* Starbird, 40.
 McEntire *v.* Brown, 1542.
 McFadden *v.* Allen, 37.
 McFadden *v.* Ice Co., 78.
 McFarland *v.* Chase, 460.
 McFarland *v.* Febiger, 368.
 McFarland *v.* Stone, 1101.
 McFarland *v.* Williams, 101.
 McGee *v.* Walker, 53.
 McGehee *v.* McGehee, 404.
 McGenness *v.* Adriatic Mills, 69.
 McGeorge *v.* Hoffman, 1143.
 McGettigan *v.* Potts, 146.
 McGinnis *v.* Fernandes, 55.
 McGrath *v.* Wallace, 1105.
 McGreevy *v.* McGrath, 921.
 McGregor *v.* Brown, 519.
 McGrew *v.* Hannon, 1228.
 McInerney *v.* Peck, 1175.
 McIntosh *v.* Lown, 502.
 McIver *v.* Estabrook, 47.
 McKaig *v.* McKaig, 399.
 McKeage *v.* Hanover Fire Ins. Co., 35.
 McKean *v.* Brown, 264.
 McKee *v.* Barley, 978, 1443.
 McKee *v.* Spice, 1536.
 McKenzie *v.* Elliott, 1142, 1144.
 Mackenzie *v.* Childers, 1215.
 McKey *v.* Hyde Park, 1511.
 McKildoes *v.* Darracott, 646, 647.
 McKinney *v.* Pinckards, 1268.
 McKissick *v.* Pickle, 628.
 McLevy *v.* McLevy, 319.
 McLeod *v.* Burkshalter, 1530.
 McLeod *v.* Tarrant, 1203.
 McLindon *v.* Horton, 244.
 McLoud *v.* Roberts, 719.

[References to pages]

- McMahan *v.* Gray, 395, 396.
 McMahan *v.* Williams, 1215.
 McManus *v.* Carmichael, 72.
 McManus *v.* Cooke, 166.
 McMasters *v.* Negley, 293.
 McMath *v.* Levy, 41.
 McMichael *v.* Craig, 247.
 McMillan *v.* Cox, 1465.
 McMillan *v.* Cronin, 143.
 McMillan *v.* Solomon, 31.
 McMorris *v.* Webb, 1159.
 McMullins *v.* Sanders, 1266.
 McMurray *v.* Dixon, 1113, 1114,
 1306, 1310, 1311.
 McMurray *v.* McMurray, 1158.
 McNab *v.* Robertson, 75.
 McNeeley *v.* McNeeley, 831.
 McNeely *v.* Langan, 1106, 1107.
 McNeil *v.* Ames, 509.
 McNeil *v.* Baird, 1440.
 McNish *v.* Pope, 309.
 McPherson *v.* McPherson, 481.
 McPherson *v.* Reese, 1237.
 McRea *v.* Farrar, 1481.
 McRea *v.* Central Nat. Bank, 34,
 38, 44.
 McReynolds *v.* Counts, 384.
 McTavish *v.* Carroll, 118.
 Machir *v.* Funk, 1487, 1488, 1489.
 Mack *v.* Patchin, 482, 483, 498, 499.
 Mackay *v.* Bloodgood, 1237, 1239.
 Mackreth *v.* Simmons, 694, 759.
 Madden *v.* Madden, 201, 917.
 Moddox *v.* Maddox, 654, 657, 658.
 Madigan *v.* McCarthy, 45.
 Madison *v.* Larmon, 931.
 Magarity *v.* Shipman, 742.
 Magee *v.* Mellon, 391.
 Magee *v.* Reynolds, 720.
 Magee *v.* Young, 345, 346.
 Maggort *v.* Harnsbarger, 502, 542.
 Magniac *v.* Thompson, 1283, 1294.
 Magor *v.* Chadwick, 157.
 Magruder *v.* Peter, 706, 715, 716.
 Maguire *v.* Riffin, 346.
 Mahan *v.* Brown, 151.
 Mahoney *v.* Young, 343, 344.
 Mahoning County *v.* Young, 1514.
 Mainwaring *v.* Jennison, 38, 45.
 Major *v.* Ficklin, 1301.
 Major *v.* Lanaly, 1166.
 Maldon's Case, 1187.
 Malin *v.* Keighley, 1490.
 Mallet *v.* Smith, 1413.
 Mallet *v.* Simpson, 1173.
 Malloney *v.* Horan, 372.
 Malone *v.* McLaurin, 266, 273, 274.
 Malones *v.* Hobbs, 1397, 1398.
 Maloney *v.* Kennedy, 279.
 Mandel *v.* McClave, 345, 371.
 Mander *v.* Falcke, 1214.
 Mandlebaum *v.* McDonnell, 660.
 Manikee *v.* Beard, 349.
 Manly Mfg. Co. *v.* Broadus, 805.
 Mann *v.* Jackson, 655.
 Manning *v.* Laboree, 320.
 Manns *v.* Givens, 1565.
 Marbach *v.* Holmes, 1110, 1112,
 1117, 1575.
 Marbury *v.* Cole, 989, 991.
 Marbury *v.* Thornton, 514, 1216,
 1228.
 Marines *v.* Goblet, 1508.
 Markham *v.* Guerrant, 579.
 Markham *v.* Merrett, 28, 314.
 Markland *v.* Crump, 917.
 Marks *v.* Hill, 1288.
 Marks *v.* Morris, 747.
 Marlborough *v.* Godolphin, 1460.
 Marsellis *v.* Thalheimer, 283.
 Marsh *v.* Brace, 508.
 Marsh *v.* Lee, 1243.
 Marsh *v.* Love, 1489.
 Marsh *v.* Whitmore, 606, 607.
 Marshall *v.* Heard, 473.
 Marshall *v.* Moseley, 491.
 Marshall *v.* Palmer, 978, 1009.
 Marshall *v.* Rutton, 1163, 1164.

[References to pages]

- Marstellar v. McLean*, 1100.
Marston v. Hobbs, 1219.
Marston v. Roe, 1401.
Martin v. Blanchette, 434.
Martin v. Cole, 1549.
Martin v. Develly, 376, 391.
Martin v. Drinan, 1217.
Martin v. Flowers, 1195.
Martin v. Jett, 154.
Martin v. Kirby, 830.
Martin v. Knapp, 53.
Martin v. Martin, 107, 491, 517, 1027.
Martin v. Merritt, 377.
Martin v. Snowden, 621, 1516, 1517.
Martin v. Thayer, 1364, 1367.
Martyn v. Mowlin, 725, 726.
Marvin v. Brewster Iron Min. Co., 63, 87, 145, 146.
Martz v. Martz, 1384, 1386.
Marx v. Hawthorn, 1547.
Mason v. Crowder, 1542.
Mason v. Mason, 370.
Mason v. Wheeler, 1487.
Masonic Temple Ass'n v. Banks, 68.
Massey v. Yancey, 1295.
Massie v. Sebastian, 391, 68.
Massie v. Watts, 615.
Massies v. Heiskell, 1108, 1132, 1144.
Massot v. Moses, 63, 64, 87, 92.
Masters v. Masters, 1376.
Masterson v. Pullen, 570.
Masury v. Southworth, 571.
Matthews v. Ferea, 1102.
Mathis v. Hammond, 921.
Matney v. Ratliff, 620.
Matthews v. Burton, 1102.
Matthews v. McDade, 1486.
Mattocks v. Stearns, 264.
Matts v. Hawkins, 148.
Maul v. Rider, 1537.
Maule v. Ashmead, 498.
Maundrell v. Maundrell, 353, 354, 884, 1475.
Maunds v. McPhail, 1174.
Mauzy v. Sellars, 575, 1302.
May v. Joynes, 201, 202, 237, 244, 601, 824, 941, 1474.
May v. May, 417.
Mayburry v. Brien, 311, 312.
Maydock v. Jackson, 884.
Mayfair Property Co. v. Johnston, 148.
Mayhew v. Hardesty, 512.
Mayho v. Buckhurst, 510, 511, 1212, 1216.
Maynard v. Maynard, 1243.
Mayo v. Carrington, 1268.
Mayo v. Giles, 722.
Mayo v. Judah, 670.
Mayo v. Tomkies, 709.
Mayor, etc., v. Corliss, 472.
Maysville v. Boom, 83.
Maywood v. Logan, 477.
Maywood Co. v. Village of Maywood, 133.
Meacham v. Bunting, 264, 279.
Mead v. Haynes, 1088.
Meade v. Merritt, 615.
Meadows v. Tanner, 1441.
Meagher v. Hayes, 30, 37.
Meakings v. Cromwell, 1482.
Mebane v. Mebane, 665.
Mebane v. Patrick, 1140.
Mechelin v. Wallace, 438.
Maeklem v. Blake, 1231.
Medley v. Medley, 293, 922, 1066, 1069.
Meeker v. Breintnall, 1488.
Meekes v. Thompson, 90.
Meid v. Onery, 708.
Meikle v. Borders, 1332.
Melizet's Appeal, 346.
Mellor v. Spateman, 1149.
Mellus v. Snowman, 285.

[References to pages]

- Meltram v. Devon*, 948.
Melvin v. Proprietors, etc., 285.
Melvin v. Whiting, 1140.
Memmert v. McKeen, 1224.
Mendenhall v. Klinck, 164.
Mercantile Co-operative Bank v. Brown, 1565.
Mercer v. Kelso, 1364.
Mercer v. Selden, 270.
Mercer v. Woodgate, 1511.
Merchants' Bank v. Thomson, 403.
Merchants' Bank of Baltimore v. Campbell, 712, 714, 1266.
Merchants' Bank of D. v. Ballou, 584, 1595.
Merchants' National Bank v. Staunton, 36, 37.
Merchants' & Mechanics' Sav. Bank v. Dashiell, 797, 799.
Meredith v. Frank, 130, 131.
Meredith v. Joans, 562.
Meriwether v. Garrett, 1041.
Merriam v. Simonds, 912, 922.
Merrifield v. Cobleigh, 641.
Merrifield v. Lombard, 69.
Merrifield v. Worcester, 69.
Merrill v. Dearing, 1539.
Merrills v. Swift, 1241.
Merriman v. Cover, 652.
Merriman v. Miles, 727.
Merriman v. Moore, 727.
Merritt v. Brinckerhoff, 66.
Merritt v. Bunting, 1250, 1579, 1592.
Merritt v. Closson, 498.
Merritt v. Scott, 252.
Merryman v. Bourne, 248, 479, 621.
Merryman v. Hoover, 581, 1100.
Messinger's Appeal, 1142.
Mestaer v. Gillespie, 1456.
Metcalf v. Hart, 161, 163, 166.
Metcalf v. McCutchen, 1113.
Methodist Epis. Church v. Jaques, 1496.
Metropolitan Ry. Co. v. Fowler, 18.
- Meux v. Jacobs*, 44.
Mews v. Carr, 1425.
Meyers v. Schemp, 46.
Michael v. Foil, 1262.
Mich. Mut. Life Ins. Co. v. Cronk, 31, 44.
Michaux v. Brown, 772.
Michie v. Jeffries, 602.
Michoud v. Gerod, 1182.
Middlebrook v. Corwin, 41, 42.
Middlesex Co. v. Lowell, 132.
Middleton v. Arnold, 631.
Middleton v. Johns, 1104.
Mifflin's Appeal, 1472.
Mildmay's Case, 664, 878.
Miles v. Harford, 934.
Milford v. Holbrook, 474.
Mill v. Bodley, 1106.
Milledge v. Lamar, 293.
Miller's Appeal, 1023.
Miller's Estate, 937.
Miller, In re, 921.
Miller v. Argyle, 751, 753.
Miller v. Beverley, 409.
Miller v. Beverley's, 603, 752.
Miller v. Black Rock Springs Imp. Co., 75, 76, 77.
Miller v. Blosses, 571, 572.
Miller v. Brown, 121.
Miller v. Bumgardner, 1101.
Miller v. Cheney, 55.
Miller v. Fletcher, 1245.
Miller v. Greggs, 1532.
Miller v. Holcombe, 597, 601, 603, 604.
Miller v. Holland, 763, 764.
Miller v. Jones, 1482.
Miller v. Marshall, 100.
Miller v. Miller, 1417.
Miller v. Moore, 941.
Miller v. Morris, 502.
Miller v. New York, 84.
Miller v. Pence, 397.
Miller v. Shackelford, 461.

[References to pages]

- Miller *v.* State, 161.
 Miller *v.* Thompson, 727.
 Miller *v.* Trevillian, 594, 601, 742, 749, 751, 753, 754.
 Miller *v.* Trustees, 716.
 Miller *v.* Wills, 538.
 Millers *v.* Potterfield, 202.
 Milligan *v.* Cooke, 1456.
 Milliken *v.* Welliber, 864.
 Milne *v.* Clarke, 1525.
 Mills *v.* County Comers, 83.
 Mills *v.* Harris, 570.
 Millis *v.* Penny, 1114.
 Mills *v.* Tukey, 1530.
 Mineral Development Co. *v.* James, 444.
 Minneapolis Co-operative Co. *v.* Williamson, 494.
 Minneapolis Mill Co. *v.* Railway, 165.
 Minneapolis West Ry. Co. *v.* Railway Co., 167.
 Minnis *v.* Aylett, 1374.
 Minor *v.* Hill, 724.
 Minot *v.* Prescott, 1466.
 Mishollen *v.* Rice, 1490.
 Missionary Soc. of M. E. Church *v.* Calverts, 611, 941.
 Mississippi Mills Co. *v.* Smith, 69.
 Miss. & Mo. R. Co. *v.* Cromwell, 1442.
 Mitchell *v.* Barratta, 258.
 Mitchell *v.* Johnson, 384, 1464, 1477, 1490.
 Mitchell *v.* Ladew, 720, 724.
 Mitchell *v.* Leavitt, 659, 668.
 Mitchell *v.* Moore, 279.
 Mitchell *v.* Reynolds, 65.
 Mitchell *v.* Rome, 1146, 1148.
 Mitchell *v.* Ryan, 268, 1241.
 Mitchell *v.* Seipel, 131.
 Mitchell *v.* Warner, 1229.
 Mizzell *v.* McGowan, 154.
 Moell *v.* Sherwood, 1381.
 Moffat *v.* Smith, 486.
 Monks *v.* Dykes, 439.
 Monmouth Park Ass'n *v.* Wallis Iron Works, 669.
 Monongahela Bridge Co. *v.* Kirk, 71.
 Monroe *v.* James, 1411.
 Montacute *v.* Maxwell, 1420.
 Montague *v.* Allen, 1365, 1369.
 Montague *v.* Jeffries, 1393.
 Montgomery *v.* Trustees, etc., 148.
 Monypenny *v.* Dering, 933.
 Moodie *v.* Reid, 1404.
 Moody *v.* Haskins, 1539.
 Moody *v.* King, 293.
 Moody *v.* McClelland, 144, 146.
 Moody *v.* Wright, 1272.
 Moon *v.* Stones, 192, 221, 849, 876, 960.
 Moor *v.* Veazie, 72.
 Moore *v.* Boyd, 466.
 Moore *v.* Brooks, 847.
 Moore *v.* Butter, 1294.
 Moore *v.* Com., 578.
 Moore *v.* Conner, 1067, 1074, 1077.
 Moore *v.* Crawford, 1367.
 Moore *v.* Crose, 116, 117.
 Moore *v.* Darby, 273, 274, 286, 287, 346.
 Moore *v.* Estey, 316.
 Moore *v.* Fitzwater, 1305, 1452.
 Moore *v.* Frankenfeld, 482.
 Moore *v.* Frost, 397.
 Moore *v.* Gilliam, 312.
 Moore *v.* Greene, 1105.
 Moore *v.* Hazelton, 1241.
 Moore *v.* Holcombe, 722.
 Moore *v.* Johnston, 1220.
 Moore *v.* Jordan, 1261.
 Moore *v.* Lackey, 760.
 Moore *v.* Lyons, 830.
 Moore *v.* Merrill, 1229.
 Moore *v.* Moore, 1390, 1466.
 Moore *v.* Mustoe, 572.

[References to pages]

- Moore v. New York, 345, 346, 347, 370, 371.
 Moore v. Randolph, 1439.
 Moore v. Rawson, 136, 137.
 Moore v. Simonson, 257.
 Moore v. Smaw, 63.
 Moore v. Tisdale, 371, 392.
 Moore v. Townshend, 450, 478, 526.
 Moore v. Ullman, 1285.
 Moore v. Vail, 1228.
 Moore v. Waco, 1203.
 Moore v. Wait, 523.
 Moore v. Waller, 408.
 Moore v. Webber, 477.
 Moore v. Weber, 478, 482, 499.
 Moorman v. Crockett, 1021.
 More's Case, 664.
 Morgan v. Bissell, 444.
 Morgan v. Glendy, 691, 692, 756.
 Morgan v. Griffith, 223.
 Morgan v. Gronow, 1471.
 Morgan v. Haley, 1028, 1228, 1230, 1231.
 Morgan v. Menth, 138.
 Morgan v. Morgan, 277.
 Morley v. Reynoldson, 654.
 Morris v. Bacon, 720.
 Morris v. Burroughs, 1413.
 Morris v. Candle, 1173.
 Morris' Cotton, 206.
 Morris v. French, 36.
 Morris v. Joseph, 1531.
 Morris v. McCarty, 989.
 Morris v. Owen, 1463, 1477, 1490.
 Morris v. Stephenson, 375.
 Morris v. Terrell, 1593.
 Morrison v. Bausemer, 584, 1595.
 Morrison v. Campbell, 1411.
 Morrison v. Marquardt, 152.
 Morrison v. Peay, 434.
 Morriss v. Garlands, 384.
 Morriss v. Virginia State Ins. Co., 601, 750, 757.
 Morritt v. Douglas, 1388.
 Morry v. Michael, 1487.
 Morse v. Blood, 661.
 Morse v. Copeland, 120, 140, 161, 168.
 Morse v. Garner, 510.
 Morse v. Martin, 1494.
 Mort v. Jones, 1016, 1018, 1021, 1037, 1067, 1456, 1457.
 Mortlock v. Buller, 376, 1455, 1456.
 Morton v. Noble, 346, 371.
 Morton v. Tewart, 968.
 Mosby v. Mosby, 982, 1481, 1483.
 Moseley's Trusts, In re, 935.
 Moseley v. Buck, 1269.
 Moses v. Loomis, 645, 646.
 Mosher v. Mosher, 313, 344.
 Moss v. Crallimore, 707.
 Moss v. Green, 687.
 Moss v. Moormans, 601.
 Moss v. Shear, 1530.
 Motley v. Motley, 392.
 Mott v. Ackerman, 1489.
 Mott v. Palmer, 29, 31, 35, 37, 44.
 Moule v. Garrett, 513.
 Moule v. Robinson, 100.
 Mountain v. Bennet, 1180.
 Mountfort, Ex parte, 1433.
 Mountjoy's Case, 87, 94.
 Mourey's Case, 1394.
 Moury v. Providence, 1510.
 Mudd v. Mullican, 251.
 Muldrow v. Fox, 1481.
 Mullany v. Mullany, 273, 277, 279.
 Mullen v. Strickler, 128, 1148.
 Muller v. Bayley, 1161.
 Muller v. Landa, 74.
 Mullreed v. Clark, 937.
 Mulry v. Norton, 1090, 1091.
 Mumford v. Brown, 1002.
 Mumford v. Whitney, 158, 166.
 Mundorf v. Kilburn, 1416.
 Mundy v. Vawter, 579, 583, 597, 1250, 1579, 1592.

[References to pages]

- Munger v. Tonawanda R. Co.*, 150.
Murdock v. Chapman, 1255.
Murdock v. Gifford, 38.
Murly v. McDermott, 148.
Murphy's Estate, 1482.
Murphy v. Welch, 1143.
Murray v. Albertson, 477.
Murray v. Barley, 1168.
Murray v. Cherrington, 427.
Murray v. Hale, 973.
Murray v. Harway, 645.
Murray v. Rickard, 1194.
Murrell v. Diggs, 1572.
Murrell v. Roberts, 517.
Muse v. Friedenwald, 177, 273.
Mustard v. Wohlfords, 631, 901, 1156, 1157.
Mutual Assur. Co. v. Stanard, 775.
Mutual Assur. Co. v. Stone, 736, 1588, 1589.
Mutual Benefit Life Ins. Co. v. Grace Church, 659.
Mutual Life Ins. Co. v. Everett, 1494.
Mutual Life Ins. Co. v. Shipman, 396, 1487.
Muzzarelli v. Hulshizer, 1215.
Myers v. Daviess, 651.
Myers v. Dunn, 126.
Myers v. Kingston Coal Co., 455.
Myers v. Safe Deposit, etc., 1493.
Myers v. Zetelle, 592, 600.
Mygatt v. Coe, 1214, 1229.

Naill v. Maurer, 387.
Nalle v. Fenwick, 1387, 1518, 1524, 1545.
Nance v. Hopkins, 1549.
Napier v. Bulwinkle, 157, 1148.
Napper v. Sanders, 836, 885.
Nash v. Fugate, 1247.
Nash v. Spofford, 391.
Nason v. Ricker, 1527.
National Union Bank at Davor v. Segur, 1216, 1217.

National Valley Bank v. Hancock, 1278.
National Valley Bank of Staunton v. Harmon, 744, 760, 764, 765.
Naylor v. Throckmorton, 1553.
Neal v. Henry, 70.
Neal v. Logan, 1303, 1446.
Neale v. Utz, 775, 776.
Nebraska v. Iowa, 1089, 1091.
Needham v. Allison, 42.
Needham v. Bransom, 991.
Needles v. Needles, 1271.
Neel v. Neel, 525.
Neely v. Boyce, 910.
Neff v. Ryman, 248, 840, 1110, 1112, 1117.
Neff v. Wooding, 765.
Negus v. Yancey, 1539.
Neil v. Keese, 567.
Neil v. Neil, 1389, 1390.
Nellis v. Lathrop, 481, 494.
Nelson v. Brewery Co., 473.
Nelson v. Browne, 727.
Nelson v. Carrington, 1445, 1446, 1482.
Nelson v. Harwood, 391.
Nelson v. Matthews, 1445.
Nelson v. Nelson, 1270.
Nelson v. Turner, 774.
Neplan v. Doe, 463.
Nettleton v. Sykes, 168.
Nevil's Case, 82.
Nevitt v. Woodburn, 983.
New Jersey Zinc Co. v. Franklinites Co., 64.
New Orleans, etc., R. R. Co. v. Moye, 1511.
Newport News v. Scott, 1513.
Newport News Shipbuilding Co. v. Jones, 72, 73.
Newport News & O. P. R. & Electric Co. v. Hampton Roads Electric Co., 84, 85, 86.
Newport News & O. P. R. & Elec-

[References to pages]

- tric Co. *v.* Lake, 581, 1509, 1510, 1513.
 New South Building & Loan Ass'n *v.* Reed, 775.
 New South Meeting House, In re, 157, 158.
 New York *v.* Law, 115.
 New York Life Ins. Co. *v.* Mayer, 370.
 New York, etc., R. Co. *v.* Railway Corners, 130.
 Newbrough *v.* Walker, 483, 499.
 Newbrough Turnpike Co. *v.* Miller, 85, 86.
 Newby *v.* Blakey, 1099.
 Newby *v.* Forsyth, 703.
 Newcomb *v.* Brooks, 583.
 Newcomen *v.* Coulson, 137.
 Newell *v.* Hill, 149.
 Newell *v.* Mayberry, 1308.
 Newhall *v.* Ireson, 67.
 Newhall *v.* Wheeler, 198.
 Newkirk *v.* Newkirk, 195, 659.
 Newley *v.* Jackson, 454.
 Newman *v.* Anderton, 438.
 Newport Water Works *v.* Sisson, 571.
 Newsom *v.* Holesapple, 937.
 Newsom *v.* Prior, 1255.
 Newsome *v.* Bowyer, 238, 1163.
 Newton *v.* Wilson, 102, 112, 496.
 Nichol *v.* Lytle's Lessee, 1115.
 Nicholas *v.* Chamberlain, 127, 131.
 Nicholas *v.* Kershner, 1367.
 Nicholas *v.* Nicholas, 1013, 1324, 1431, 1452.
 Nichols *v.* Aylor, 1140, 1144.
 Nichols *v.* Council, 1102.
 Nichols *v.* Culver, 799.
 Nichols *v.* Eaton, 666, 667.
 Nichols *v.* Furniture Co., 1253.
 Nichols *v.* Gould, 1272.
 Nichols *v.* Luce, 125, 126, 130.
 Nichols *v.* Maynard, 669.
 Nicholson *v.* Gloucester Charity School, 1571.
 Nicholson *v.* Munigle, 491.
 Nickell *v.* Handley, 579.
 Nickell *v.* Tomlinson, 371.
 Nicodemus *v.* Young, 1201.
 Nidever *v.* Ayres, 1332.
 Niehaus *v.* Shepherd, 1090.
 Neilson *v.* Brett, 840.
 Nightingale *v.* Burrell, 968.
 Nimmo *v.* Com., 1101.
 Nininger *v.* Norwood, 155.
 Nisbet *v.* Smith, 789.
 Nixon *v.* Rose, 1166.
 Noble *v.* Smith, 53.
 Noble *v.* Sylvester, 63.
 Nock *v.* Nock, 1389, 1390.
 Noel *v.* Bewley, 324.
 Noftstiger *v.* Birkdollar, 163.
 Noke's Case, 498.
 Noonan *v.* Lee, 1228.
 Noonan *v.* Pardee, 145.
 Norfleet *v.* Cromwell, 121.
 Norfolk, City of, *v.* Cooke, 1109.
 Norfolk, City of, *v.* Nottingham, 1512.
 Norfolk & W. R. Co. *v.* Carter, 155.
 Norfolk & W. R. Co. *v.* De Boards, 143.
 Norfolk & W. R. Co. *v.* Howlson, 803.
 Norfolk & W. R. Co. *v.* Johnson, 151.
 Norfolk & W. R. Co. *v.* McGavocks, 151.
 Norfolk & W. R. Co. *v.* Obenchain, 117, 136, 137, 140, 1258, 1259.
 Normans *v.* Cunningham, 973, 989, 991, 1208, 1209, 1231, 1281.
 Norris *v.* Harrison, 258, 260, 493.
 Norris *v.* Johnston, 960.
 Norris *v.* Litchfield, 474.

[References to pages]

- Norris *v.* Milner, 628.
 North *v.* James, 1101.
 Northcutt *v.* Whipp, 293, 323, 327.
 North Adams Universalist Soc. *v.* Boland, 922.
 Northern Trans. Co. *v.* Chicago, 144, 146.
 Northern Trust Co. *v.* Snyder, 510.
 Norton *v.* Babcock, 1223.
 Norton *v.* Craig, 42.
 Norton *v.* Dashwood, 45.
 Norton *v.* Kelley, 1269.
 Norton *v.* Norton, 417.
 Norton *v.* Rose, 722.
 Norton *v.* Valentine, 68.
 Norway *v.* Rowe, 538.
 Nowlin Lumber Co. *v.* Wilson, 165.
 Nowlin *v.* Reynolds, 1103, 1110, 1117.
 Nowlin *v.* Winfree, 960.
 Noyes *v.* Colby, 149.
 Nurse *v.* Craig, 1163.
 Nye *v.* Lovitt, 193, 222, 834, 837, 998, 1210, 1211, 1232, 1233, 1506, 1507.
 Nye *v.* Taunton Branch R. Co., 347.
 Oates *v.* Feith, 485.
 Oates *v.* Jackson, 221.
 O'Bannon *v.* Roberts, 1011, 1032.
 Obert *v.* Dunn, 146.
 Occum Co. *v.* A. & W. Sprague Mfg. Co., 163.
 Ocean Grove Camp Meeting Ass'n *v.* Asbury Park, 77.
 O'Connor *v.* Memphis, 498.
 O'Donnell *v.* Hitchcock, 37.
 O'Donnell *v.* Penney, 1115.
 Ogden *v.* Gibbons, 86.
 Ogilvie *v.* Falijambe, 1423.
 Ogilvie *v.* Hull, 507.
 Oglesbys *v.* Hughes, 455.
 O'Hara *v.* Richardson, 1111.
 Okeson *v.* Patterson, 1143.
 Oland's Case, 54, 60.
 Oldham *v.* Jones, 1531.
 Oldham *v.* Sale, 310.
 Old Dominion Granite Co. *v.* Clarke, 1579.
 Old South Soc. *v.* Wainwright, 1104.
 Olin *v.* Henderson, 1115.
 O'Linda *v.* Lothrop, 133.
 Oliver *v.* Hook, 135.
 Oliver *v.* Ins. Co., 434.
 Oliver *v.* Pratt, 1594.
 Olliffe *v.* Wells, 1377.
 Olmevany *v.* Jagers, 70.
 Olmsted's Estate, 1395.
 Olney *v.* Fenner, 1146.
 Olney *v.* Hull, 831.
 O'Neal *v.* Bridge Co., 1521.
 Oney *v.* West Buena Vista L. Co., 133, 1254.
 Onions *v.* Tyrer, 1395, 1397.
 Oppenheim *v.* Henry, 912.
 Oppenheim *v.* Myer, 1289, 1290.
 Orange & A. R. Co. *v.* Fulvey, 29.
 Orman *v.* Day, 148.
 Orme's Case, 562.
 O'Rourke *v.* O'Connor, 1596.
 Orr *v.* Pennington, 1269, 1270.
 Osborne *v.* Big Stone Gap Colliery Co., 807.
 Osborne *v.* Cabell, 726, 727.
 Osbrey *v.* Bury, 884.
 Osgood *v.* Franklin, 982, 1268, 1481.
 Osgood *v.* Howard, 46.
 Osgood *v.* Strobe, 1451.
 Ostrander *v.* Darling, 1547.
 Oswald *v.* Wolf, 135.
 Otis *v.* Smith, 31.
 Otley *v.* McAlpines, 1027, 1031.
 Ott *v.* Kreiter, 133.
 Otterback *v.* Bohrer, 935.

[References to pages]

- Oullahan *v.* Sweeney, 1539.
 Overdeer *v.* Lewis, 463.
 Overfield *v.* Christie, 1106, 1107.
 Overman *v.* Sasser, 48.
 Overseers of Poor *v.* Sears, 197.
 Overtons *v.* Davisson, 1108, 1109,
 1119, 1121, 1123, 1124, 1125, 1129.
 Owen *v.* Cogbill, 1066.
 Owen *v.* Ellis, 1487.
 Owen *v.* Hyde, 342.
 Owen *v.* Robbins, 333.
 Owen *v.* Sharp, 1276.
 Owen *v.* Slatter, 392.
 Owens *v.* Dickenson, 1168.
 Owings *v.* Jones, 473.
 Owsley *v.* Harrison, 930.
 Oxford Township *v.* Columbia,
 1103.
 Pace *v.* Moorman, 806, 1582.
 Packer *v.* Welsted, 130.
 Padelford *v.* Padelford, 523.
 Page *v.* Estey, 425.
 Page *v.* Fowler, 55.
 Page *v.* Page, 371.
 Page *v.* Symonds, 158, 159.
 Paget's Case, 534.
 Paget *v.* Melcher, 836.
 Paige *v.* Chapman, 723.
 Paine's Case, 262, 283, 288, 289,
 353, 1475.
 Paine *v.* Barnes, 1474.
 Paine *v.* Jones, 727.
 Paine *v.* Meller, 25.
 Paine *v.* Wagoner, 222, 968.
 Paine *v.* Woods, 78.
 Pairo *v.* Bethelle, 766, 797, 808.
 Palmer *v.* Edwards, 1340.
 Palmer *v.* Fletcher, 152.
 Palmer *v.* Garlands, 1156.
 Palmer *v.* Holford, 928.
 Palmer *v.* Palmer, 135.
 Panton *v.* Holland, 146.
 Panton *v.* Jones, 464.
 Paradine *v.* Jane, 491.
 Parcell *v.* Stryker, 1416.
 Pardee *v.* Treat, 727.
 Parfitt *v.* Hember, 220.
 Parham *v.* Thompson, 49, 53.
 Parke *v.* Seattle, 145, 146.
 Parker *v.* Brown, 1220.
 Parker *v.* Foote, 152, 1145, 1146,
 1148.
 Parker *v.* Gerard, 1034.
 Parker *v.* Griswold, 67.
 Parker *v.* Hotchkiss, 1147.
 Parker *v.* McCoy, 1038.
 Parker *v.* Mercer, 724.
 Parker *v.* Nightingale, 121, 1214,
 1215.
 Parker *v.* Obear, 397.
 Parker *v.* Parker, 404, 405.
 Parker *v.* Ross, 864.
 Parker *v.* Sears, 1481.
 Parker *v.* Wallis, 1110.
 Parkhurst *v.* Van Cortland, 120.
 1421.
 Parkman *v.* Welch, 731.
 Parks *v.* Bishop, 132.
 Parks *v.* Hewlett, 1238.
 Parks *v.* Mears, 1247.
 Parks *v.* Newburyport, 154.
 Parramore *v.* Taylor, 1269, 1368,
 1388.
 Parrill *v.* McKinley, 1422, 1428.
 Parrish *v.* Parrish, 26, 313, 314, 414.
 Parrish *v.* Whitney, 1217.
 Parsons *v.* Baker, 1477, 1490.
 Parsons *v.* Camp, 41.
 Parsons *v.* Parsons, 82.
 Parsons *v.* Trustees of Atlanta
 University, 1514.
 Partridge *v.* First Independent
 Church, 159.
 Partridge *v.* Gilbert, 132, 134, 146,
 147.
 Partridge *v.* Scott, 146.
 Pasley *v.* English, 1109.

[References to pages]

- Patch v. White*, 1579.
Patrick v. Colerick, 161, 163, 168.
Patten v. Scott, 1102.
Patterson v. Bingham, 1078.
Patterson v. Grottoes Co., 760.
Patterson v. Stoddard, 454.
Patterson v. Wilson, 1488.
Pattison's Appeal, 49, 53.
Patton v. Hoge, 760.
Patton v. Sudington, 910.
Patton v. Moore, 45.
Paul v. Baugh, 1284, 1287, 1288, 1290, 1565, 1566, 1571.
Paul v. Frierson, 836.
Paul v. Nurse, 504.
Paull v. Mockley, 115.
Pawles v. Jordan, 1499.
Paxton v. Gamewell, 981, 999.
Paxton v. Harrier, 730.
Paxton v. Rich, 679, 762, 763, 766.
Payne v. Becker, 396, 408.
Payne v. Franklin, 968.
Payne v. Graves, 1428, 1430.
Payne v. Johnson, 1487.
Payne v. Rogers, 474.
Peabody v. Hewlett, 1201.
Peachy v. Somerset, 668, 669, 670, 671, 672.
Peacock v. Eastland, 562.
Peacock v. Evans, 1454.
Peacock v. Monk, 1166.
Peake v. Jenkins, 1382.
Pearce v. Gardner, 1488.
Pearce v. McClenaghan, 138.
Pearks v. Moseley, 935, 936.
Pearson v. Pearson, 1388.
Peck v. Cary, 1365, 1367.
Peck v. Ingersoll, 494, 512.
Peck v. Lloyd, 140, 161, 168.
Peden v. Chicago, etc., Ry. Co., 1216.
Peck v. Roe, 151.
Peery v. Elliott, 1250, 1432.
Peirce v. Grice, 30, 36, 40, 46, 428, 466, 467.
Peice v. Life, 381.
Pells v. Brown, 219, 873, 914, 937, 955.
Peltz v. Voight Brewery Co., 478.
Pemberton v. Pemberton, 1397, 1399.
Pendleton v. Stewart, 1447.
Pendleton v. Vandevier, 246.
Penhallcw v. Dwight, 49, 53.
Penn v. Baltimore, 615.
Penn v. Guggenheimer, 585, 1463.
Penn v. Hearon, 675, 758, 761, 762.
Penn v. Lord Baltimore, 1452.
Penn v. Spencer, 1299.
Penn v. Whitehead, 1166, 1168.
Pennant's Case, 626, 646, 664.
Pennick v. Lyons, 645.
Penniman's Will, In re, 1395.
Pennoyer v. Allen, 152.
Pennoyer v. Neff, 1029.
Pennsylvania College Case, 84.
Penn. R. Co. v. Parke, 201, 662.
Pennybacker v. Maupin, 1435, 1436, 1437, 1450.
Penrice v. Penrice, 417.
Pentland v. Keep, 1148.
Penton v. Robart, 40, 47.
Penzel v. Brookmire, 724.
People v. Botsford, 469.
People v. Canal Appraisers, 71.
People v. Detroit Lead Works, 152.
People v. Gillis, 445.
People v. Kirk, 1088.
People v. Lambier, 1090.
People v. Lynch, 1547.
People v. New York, 1540.
Peoples' Gas Co. v. Tyner, 77, 78, 79.
Peoria v. Simpson, 473.
Pepin County v. Prindle, 659, 668.
Pepper's Appeal, 1493.
Pequawkett Br. v. Mathes, 1239.
Perine v. Dunn, 710.
Perkins v. Adams, 1091.
Perkins v. Fisher, 921, 934.

[References to pages]

- Perkins *v.* Jones, 1381.
 Perkins *v.* Perkins, 1381.
 Pernam *v.* Wead, 1255.
 Perrot *v.* Perrot, 535.
 Perry's Appeal, 724.
 Perry *v.* Aldrich, 492.
 Perry *v.* Calhoun, 410.
 Perry *v.* Com., 1383.
 Perry *v.* Davis, 645.
 Perry *v.* Penn. R. Co., 116.
 Perry *v.* Phillips, 950.
 Persinger *v.* Simmons, 1019.
 Pery *v.* White, 867, 868.
 Peter *v.* Beverley, 1460, 1481, 1482.
 Peter *v.* Kendal, 83, 84.
 Petermans *v.* Laws, 1574.
 Peters *v.* Bowman, 1221.
 Peters *v.* Cartier, 1331.
 Peters *v.* Lynchburg, City of, 1516.
 Peters *v.* Newkirk, 494.
 Peters *v.* Tunell, 759.
 Peterson *v.* Kittridge, 1528.
 Peterson *v.* Laik, 1157, 1158.
 Petersburg, City of *v.* Petersburg
 Benev. Mechanics' Ass'n, 1546.
 Pettigrew *v.* Evansville, 155.
 Pettingill *v.* Porter, 126.
 Pettit *v.* Cowherd, 462.
 Pettit *v.* Jennings, 722.
 Petts *v.* Gaw, 1258.
 Pettys *v.* Atlantic Savings & Loan
 Ass'n, 608.
 Petty *v.* Petty, 350.
 Peyton *v.* Harman, 1304.
 Phalen *v.* Com., 83.
 Phaup *v.* Wooldridge, 1400, 1401.
 Phelan *v.* Brady, 1596.
 Phelps *v.* Lilby, 565, 683.
 Phelps *v.* Nowlen, 77, 151.
 Philadelphia R. R. Co. *v.* Kerr,
 475.
 Phillips *v.* Croft, 683.
 Phillips *v.* Ferguson, 24.
 Phillips *v.* Harrow, 930.
 Phillips *v.* Phillips, 26, 271, 283, 314.
 Phillips *v.* Rector, 805.
 Phillips *v.* Rhodes, 88.
 Phillips *v.* Smith, 523.
 Phillips *v.* Stevens, 502.
 Phinizy *v.* Guernsey, 25.
 Phippard *v.* Mansfield, 867, 868.
 Phippen *v.* Durham, 1289.
 Phoenix Ins. Co. *v.* Continental Ins.
 Co., 1215.
 Pickard *v.* Sears, 1508.
 Picket *v.* Morris, 722.
 Pidcock *v.* Patter, 1366.
 Pierce *v.* Cleland, 120.
 Pierce *v.* Dyer, 146.
 Pierce *v.* Goddard, 31.
 Pierce *v.* Hakes, 869.
 Pierce *v.* Keator, 808.
 Pierce *v.* Shaw, 724.
 Pierce *v.* Turner, 1278.
 Pierces *v.* Catron, 1428.
 Pierces *v.* Triggs, 26, 314, 573.
 Pierre *v.* Fernald, 151, 1143, 1148.
 Piersol *v.* Roop, 1499.
 Pierson *v.* Garnett, 1490.
 Pigg *v.* Corder, 1428, 1435, 1451.
 Piggot *v.* Bullock, 534, 535.
 Piggott *v.* Penrice, 1491.
 Pike *v.* Stephenson, 831.
 Pike *v.* Wassell, 1530.
 Pillow *v.* Roberts, 1237.
 Pillow *v.* Southwest Va. Imp. Co.,
 975, 976, 1009, 1027, 1028, 1501.
 Pillow *v.* Wade, 370.
 Pillsbury *v.* Moore, 67.
 Pimm *v.* St. Louis, 1101.
 Pinckard *v.* Woods, 583.
 Pindall *v.* Bank of Marietta, 742.
 Pine Beach Co. *v.* Columbia Co.,
 1505.
 Pinhorn *v.* Souster, 456.
 Pinnington *v.* Galland, 125, 130.
 Piper *v.* Douglas, 1042.
 Pitcher *v.* Dove, 1522.

[References to pages]

- Pitt v. Lancaster Mills*, 66.
Pitt v. Smith, 1161.
Pittsburgh & L. A. Iron Co. v. Lake Superior Iron Co., 1115.
Pitzer v. Logan, 608.
Pitzman v. Boyce, 165, 167, 1148.
Pixley v. Clark, 69.
Platner v. Sherwood, 238, 327, 1164.
Platt v. Sloop, 899.
Pleasant v. Benson, 466.
Pleasants v. Pleasants, 931, 936.
Plimpton v. Converse, 138.
Plowman v. Williams, 1223.
Plumb v. Robinson, 1536.
Plumer v. Robertson, 1595.
Plunkett v. Bryant, 1427, 1428, 1429, 1430.
Plunkett v. Holmes, 325.
Poe v. Dixon, 727.
Poe v. Paxton, 760.
Poindexter v. Burwell, 1027.
Poindexter v. Jeffries, 1299.
Poindexter v. May, 149, 150.
Polack v. Pioche, 502.
Polack v. Shafer, 439.
Pollard v. Lively, 1567, 1575, 1576.
Pollard v. Noyes, 338, 402.
Pollard v. Rogers, 1441.
Pollard v. Slaughter, 293.
Pollock v. Glassell, 1383, 1387, 1390, 1484.
Polson v. Ingram, 136.
Pomfret v. Ricroft, 143.
Pool v. Lewis, 67.
Poole's Case, 39, 40.
Poole v. Bentley, 444.
Pope v. Mead, 408.
Pordage v. Cole, 644.
Porter's Case, 936.
Porter v. Bradley, 940.
Porter v. Durham, 155.
Porter v. Merrill, 439.
Porter v. Noyes, 1223.
Porter v. Porter, 264, 285, 286, 305, 346, 1364, 1367.
Porter v. Robinson, 399.
Porter v. Turner, 1494.
Portland v. Topham, 1497.
Portsmouth v. Shackford, 1463.
Post v. Kearney, 1340.
Post v. Pearsall, 86.
Post v. Rohrbach, 933.
Post v. Weil, 1215.
Potter v. Couch, 659, 660, 663.
Potter v. Everitt, 397.
Potter v. Gardner, 586, 591.
Potts v. House, 1363, 1364, 1366, 1367, 1369.
Powell's Trusts, In re, 1472.
Powell v. Cheshire, 538.
Powell v. Dayton S. & G. R. R. Co., 527.
Powell v. Knowles, 1454.
Powell v. Monsen & Brimfield Mfg. Co., 404, 405, 406.
Powell v. Morgan, 451, 1413.
Powell v. Powell, 1395.
Powell v. Sims, 129, 1148.
Powells v. White, 703, 789.
Power v. Tazewells, 1109.
Powis v. Smith, 975.
Powlet v. Bolton, 535.
Pownal v. Taylor, 1117, 1215.
Prather v. McDowell, 1201.
Pratt v. H. M. Richards Jewelry Co., 494.
Pratt v. Lamson, 1147.
Pratt v. Ogden, 167.
Pratt v. Sweetser, 136.
Pratt v. Vattier, 1118.
Pray v. Stebbins, 990, 991.
Preble v. Maine Cent. R. Co., 1113.
Prentice v. Geiger, 132.
Presbyterian Church v. Andruss, 157.
Prescott v. Edwards, 1511, 1513.
Prescott v. Long, 221.

[References to pages]

- Prescott v. Trueman*, 1222.
Prescott v. White, 143, 1223.
Prescott v. Williams, 1223.
Preston v. Bowerman, 1256.
Preston v. Hull, 1194, 1398.
Preston v. Johnson, 748, 750.
Preston v. McCall, 514, 1356.
Preston v. Nash, 585, 733, 736, 1589.
Preston v. Va. Mining Co., 1111.
Prevot v. Lawrence, 482.
Price v. Courtney, 1465.
Price v. Crozier, 1025.
Price v. Hall, 860.
Price v. Hobbs, 404.
Price v. Inhabitants, etc., 1513.
Price v. Lyon, 157.
Price v. Methodist Epis. Church, 159.
Price v. Pickett, 56.
Price v. Price, 28.
Price v. Thompson, 1514.
Price v. Thrash, 778, 779, 780.
Price v. Wall, 1581, 1582, 1601.
Prince v. Bearden, 683.
Prince v. Case, 164, 165, 166, 167.
Prince v. Wilbourn, 1145.
Pringle v. Witten, 1220.
Prior v. Kinney, 1278, 1580.
Prison Ass'n of Va. v. Russell, 1396, 1410.
Pritts v. Ritchey, 332 333.
Proctor v. Bishop of Bath & Wells, 934.
Proctor v. Hodgson, 125.
Promfret v. Ricroft, 125, 541.
Promfret v. Windsor, 1596.
Proprietors v. Lowell, 31.
Protestant Episcopal Education Soc. v. Churchman's Representatives, 612, 613, 1371.
Providence Bank v. Billings, 83.
Provost of Queen's College v. Hallitt, 540.
Pugh v. Bell, 332.
Pugh v. Duke of Leeds, 441.
Pugh v. Russell, 1523.
Pugsley v. Aiken, 466.
Pulitzer v. Livingston, 930.
Pullen v. Mullen, 1301, 1457.
Pulvertoft v. Pulvertoft, 1294.
Pumphrey v. Brown, 571.
Purcell v. Goshorn, 376.
Purcell v. McCleary, 1303.
Purcell v. Wilson, 975, 1000.
Purdy v. Hoyt, 864.
Purefoy v. Rogers, 324, 325, 861, 880, 906, 918.
Purner v. Piercy, 52.
Pusey v. Gardner, 567.
Putnam v. Tuttle, 122.
Pyer v. Carter, 131.
Pyke v. Franklin, 222.
Pykes v. Mitford, 844.
Quarles v. Lacy, 594, 601, 689, 748, 749, 1298.
Queen v. St. George Union, 431.
Queen Anne's County Poor Trustees v. Pratt, 400.
Quesenberry v. Barbour, 1156.
Quicksall v. Philadelphia, 1512.
Quincy v. Baker, 1507.
Quincy v. Jones, 146, 1148.
Quintini v. Bay St. Louis, 151.
Raby v. Reeves, 1216.
Kadburn v. Jervis, 82.
Radcliff v. Brooklyn, 145.
Railroad Co. v. Carr, 70.
Railsback v. Walke, 434.
Raines v. Phillips, 1248.
Raines v. Walker, 1233, 1234, 1506, 1507, 1571.
Ralston v. Ralston, 344, 405.
Ralston v. Weston, 1103.
Ramsay, Abbot of, Case, 1088.
Ramsey v. Glenney, 1113.
Ramsey v. Ramsey, 1380, 1381.

[References to pages]

- Randall v. Randall*, 26, 314.
Randall v. Russell, 917.
Randolph v. East Birmingham Co., 1477.
Randolph v. Wright, 244.
Raney v. Heater, 829, 830.
Rangeley v. Midland Ry. Co., 115.
Rankin v. Goodwin, 1296.
Rankin v. Roler, 1239.
Rannell v. Gerner, 391.
Ransome v. Fraysers, 688.
Raper v. Sanders, 410, 1484, 1489.
Rapier v. Tramways Co., 152.
Ratcliffe v. Mason, 337.
Ratliffe's Case, 1053.
Ratliff v. Ratliff, 272, 279, 282, 1066, 1276.
Ratliff v. Vandikes, 1439.
Rau v. Shaver, 774.
Rausch v. Moore, 396.
Rawlinson v. Montague, 241, 1085, 1086.
Rawlyn's Case, 435.
Rawson v. Bell, 121.
Rawston v. Taylor, 154.
Ray v. Lynes, 151.
Ray v. Pease, 1258.
Ray v. Pung, 353, 354, 1475.
Ray v. Sweeney, 128.
Raymond v. Andrews, 464.
Raymond v. Raymond, 1219.
Raynolds v. Carter, 703.
Rayner v. Lee, 395.
Rayner v. Nugent, 158.
Read v. Patterson, 754, 755.
Read v. Willis, 968.
Reade v. Reade, 884.
Ready v. Hanim, 335.
Reckhow v. Schanck, 456, 463.
Rector v. Waugh, 198.
Red River Rover Mills v. Wright, 69.
Red v. Dyer, 714.
Reddick v. Long, 1120.
Redford v. Clarke, 588, 591, 979, 1100, 1131, 1132.
Redford v. Gibson, 568.
Redmond v. Excelsior Sav. Fund, 1508.
Redwine v. Brown, 1230.
Reed v. Garnett, 132, 1140, 1142, 1143, 1144.
Reed v. Lewis, 427.
Reed v. Lukens, 25.
Reed v. Merriam, 1540.
Reed v. Morrison, 390.
Reed v. Reed, 273, 274, 524.
Reed v. Swan, 49, 52.
Reed v. Whitney, 332.
Reeder v. Sayre, 432.
Reeds v. Vannorsdale, 1451.
Reel v. Elder, 360.
Rich v. Sydenham, 1160.
Richard v. Munford, 1399.
Richards v. Attleborough Branch, 135.
Richards v. Bergavenny, 854.
Richards v. Chambers, 1496.
Richards v. Northwest Church, 159.
Richards v. Rose, 132.
Richards v. Scott, 1148.
Richards v. Thompson, 1540.
Richardson v. Campbell, 669.
Richardson v. Clements, 123.
Richardson v. Copeland, 46.
Richardson v. Crooker, 1466.
Richardson v. Gifford, 467.
Richardson v. Langridge, 465.
Richardson v. Pierce, 1292, 1293, 1296, 1297.
Richardson v. V. Cent. R. Co., 144.
Richardson v. Wheatland, 837.
Richardson v. Wyman, 346, 372.
Richlands Flint Glass Co. v. Hiltebeitel, 798, 799, 807.
Richmond, City of, v. Gallego Mills Co., 1510, 1513, 1514.

[References to pages]

- Richmond Ice Co. *v.* Crystal Ice Co., 112, 496, 502, 503, 479, 501.
 Richmond & D. R. Co. *v.* Durham & N. Ry. Co., 165.
 Richmond, etc., R. Co. *v.* Louisa R. Co., 84, 85, 86.
 Riddell *v.* Johnson, 1269, 1363.
 Riddick *v.* Cohoon, 939, 941.
 Riddle *v.* Whitehill, 26, 573.
 Rideout *v.* Knox, 151.
 Ridgeway *v.* Masting, 346, 372.
 Ridgeway *v.* Underwood, 1283.
 Rigby *v.* Bennett, 124.
 Riggs *v.* Murray, 1413.
 Right *v.* Beard, 454.
 Right *v.* Bucknell, 1505, 1506.
 Right *v.* Creber, 839.
 Right *v.* Darby, 461, 468.
 Rigler *v.* Cloud, 279.
 Riley *v.* Griffin, 1255.
 Riley *v.* Lissner, 479.
 Ripley *v.* Cross, 480.
 Rippen's Goods, 1395.
 Risher *v.* Adams, 837.
 Rising *v.* Stannard, 460.
 Rison *v.* Moon, 799, 802.
 Rison *v.* Newberry, 1439.
 Ritchie *v.* Putnam, 395.
 Ritger *v.* Parker, 118, 139.
 Rivers *v.* Rivers, 1416.
 Riverside Cotton Mills *v.* Lanier, 127.
 Ravis *v.* Watson, 494.
 Rixey *v.* Dietrick, 1284, 1295.
 Rixey *v.* Moorehead, 1266.
 Roach *v.* Dickinson, 644.
 Roach *v.* Roach, 838.
 Roach *v.* Wadham, 512, 1212, 1475, 1476.
 Roads *v.* Trumpington, 439.
 Roanes *v.* Archer, 579, 1244, 1558.
 Roanoke Brick & L. Co. *v.* Simmons, 759.
 Roanoke Cemetery Co. *v.* Goodwin, 158, 159.
 Roanoke Land & Imp. Co. *v.* Karn, 803.
 Roath *v.* Driscoll, 71, 1147.
 Robbins *v.* Armstrong, 1295.
 Robbins *v.* Robbins, 400.
 Robeno *v.* Marlatt, 1487.
 Roberts *v.* Cocke, 687, 688.
 Roberts *v.* Lewis, 201, 1474.
 Roberts *v.* Round, 1399.
 Roberts *v.* Stanton, 1248.
 Roberts *v.* Whiting, 285.
 Robertson *v.* Campbell, 680, 698.
 Robertson *v.* Gaines, 1479.
 Robertson *v.* Hardy, 1474.
 Robertson *v.* Smith, 1434.
 Robertson *v.* Stephens, 384.
 Roberson *v.* Wampler, 193.
 Robertson *v.* Willoughby, 683.
 Robie *v.* Flanders, 395.
 Robinette *v.* Preston, 976, 978, 1009.
 Robinson *v.* Allison, 1106, 1481.
 Robinson *v.* Bass, 1296.
 Robinson *v.* Bates, 346, 371, 372.
 Robinson *v.* Clapp, 129.
 Robinson *v.* Crenshaw, 760, 1594.
 Robinson *v.* Deering, 435, 460.
 Robinson *v.* Gardner, 83.
 Robinson *v.* Howe, 1539.
 Robinson *v.* Miller, 318, 409.
 Robinson *v.* Pete, 597, 604, 605.
 Robinson *v.* Randolph, 194, 195.
 Robinson *v.* Robinson, 837, 1063.
 Robinson *v.* Shacklett, 311, 337, 400.
 Robinson *v.* Williams, 700.
 Robinson *v.* Wood, 922.
 Robison *v.* Female Orphan Asylum, 920, 921.
 Rochford *v.* Hackman, 665, 666.
 Rockbold *v.* Barnes, 1529.
 Rockingham *v.* Penrice, 491, 492.
 Rockwell *v.* Morgan, 413.
 Rodgers *v.* McCluers, 729, 785, 787.

[References to pages]

- Roe v. Archbishop of York*, 1310.
Roe v. Bedford, 857.
Roe v. Farrars, 1118.
Roe v. Grew, 955.
Roe v. Griffiths, 950.
Roe v. Jeffery, 940.
Roffey v. Henderson, 169.
Rogers v. Boynton, 480.
Rogers v. Brokaw, 37, 44.
Rogers v. Cox, 161, 163, 168.
Rogers v. Durham, 1043.
Rogers v. Gilinger, 45.
Rogers v. Grider, 991.
Rogers v. Hurd, 1157.
Rogers v. Law, 1413.
Rogers v. Marshall, 772.
Rogers v. Pattie, 1442.
Rogers v. Payne, 726.
Rogers v. Rutter, 1536.
Rogers v. Sinsheimer, 147.
Rolfe & Rumford Asylum v. Le-febre, 928.
Roller v. Murray, 615.
Rillins v. Wright, 1547.
Rome v. Omberg, 145.
Rome Gaslight Co. v. Meyerhardt, 141.
Ronkendorf v. Taylor, 1524, 1525.
 1524, 1525.
Rood v. Hovey, 829.
Rooke v. Rooke, 884.
Roome v. Phillips, 830.
Rorer v. Ferguson, 725, 778.
Rorer Iron Co. v. Trout, 1266, 1595.
Rose v. Bartlett, 1374.
Rose v. Bunn, 123.
Rose v. Watson, 767.
Roseburgh v. Sterling, 376.
Rosehill Cemetery Co. v. Hopkinson, 158.
Rosenfield v. Arroll, 474.
Rosenthal v. Mayhugh, 391.
Roses v. Burgess, 998, 1117.
Rosewell v. Prior, 152.
Ross v. Adams, 839.
Ross v. Butler, 152.
Ross v. Drake, 830.
Ross v. Goodwin, 1104.
Ross v. McLauchlans, 742, 1300, 1301, 1452.
Ross v. Milne, 1193, 1214.
Ross v. Norvell, 682, 683, 688, 696, 705, 715.
Ross v. Overton, 112, 496, 502.
Ross v. Thompson, 1143.
Rosse's Case, 251, 898.
Rosser v. Depriest, 597.
Rosser v. Franklin, 1387.
Rossett v. Fisher, 594, 601, 749, 1439.
Roswell's Case, 535.
Roudabush v. Miller, 714.
Roulston v. Clark, 474, 476.
Roundtree v. Brantley, 1146.
Rous v. Jackson, 1472.
Row v. Dawson, 721, 722, 723.
Rowan v. Hull, 1197.
Rowbotham v. Wilson, 121.
Rowe v. Bentley, 1108, 1132, 1144.
Rowe v. Drisgell, 72.
Rowe v. St. Paul Ry. Co., 155.
Rowell v. Klein, 55.
Rowlett v. Daniell, 1348, 1349, 1354, 1475.
Rowlett v. Rowlett, 1410.
Rowton v. Rowton, 332.
Roy v. Garnett, 231, 873, 955.
Roys v. Roys, 1380, 1381.
Royal v. Aultman & Taylor Co., 641.
Royce v. Guggenheim, 507.
Royes v. Rowzie, 612, 613, 1174, 1370, 1371.
Rubey v. Huntsman, 1526.
Rucker v. Lowther, 1262.
Rucker v. Moss, 1289.
Ruckman v. Outwater, 42.

[References to pages]

- Rudisill v. Rodes*, 1406.
Ruffner v. Hill, 1256.
Ruffners v. Lewis, 981, 1000, 1032.
Ruffners v. Putney, 692.
Runkle v. Runkle, 1286, 1291, 1296, 1298.
Rushin v. Shields, 1241.
Rushout v. Rushout, 384.
Russ v. Mebins, 567, 1252.
Russ v. Perry, 392.
Russell v. Fabyan, 462, 464.
Russell v. Hudson, 1549.
Russell v. Jackson, 126.
Russell v. Keeran, 1447.
Russell v. Richards, 30, 37.
Russell, v. Russell, 692, 693, 694, 993, 1466.
Russell v. Shereton, 474.
Russell v. Watts, 129, 151.
Rust v. Low, 147, 149.
Rust v. Whittle, 375.
Rutherford v. Clark, 1466.
Rutherford v. Mayo, 383.
Rutland Marble Co. v. Ripley, 64, 93.
Rutledge v. Price Co., 1536.
Ryan v. Mahan, 1462.
Ryans v. McLeod, 1043.
Ryckman v. Gillis, 64.
Ryder v. Wager, 719.
Ryerson v. Quackenbush, 485, 494.
Rylands v. Fletcher, 156.
Rymes v. Clarkson, 1200.

Sabine v. Johnson, 70.
Saddler v. Lee, 76.
Saddler v. Pratt, 1492, 1493.
Sadler v. Taylor, 687.
Safe Deposit & Trust Co. v. Sutro, 1480.
Safford v. Safford, 315, 318, 319, 320.
St. Albans v. Shore, 644.
St. Andrew's Church's Appeal, 1217.

St. Bede College v. Weber, 1115.
St. Felix v. Rankin, 1022.
St. Helen's Smelting Co. v. Tip-ping, 152.
St. Louis v. Rutz, 1091.
St. Louis, etc., R. Co. v. Mathers, 651.
St. Louis, etc., R. Co. v. O'Baugh, 1216.
St. Louis, etc., R. Co. v. Ramsey, 72.
St. Louis Nat. Stock Yards Co. v. Ferry Co., 167.
Salisbury v. Lambe, 884.
Saltmarsh v. Smith, 395.
Samme's Case, 972, 1203.
Sampson v. Burnside, 166.
Sampson v. Cotton Mills, 47.
Sampson v. Graham, 34, 45.
Sampson v. Henry, 463.
Sampson v. Hodinott, 157, 1147.
Samson v. Rose, 54, 60.
Samuel v. Marshall, 1155, 1160, 1161, 1267, 1269.
San Francisco v. Calderwood, 1513.
San Francisco v. Fulde, 1108.
San Francisco v. Lawton, 1331.
San Leandro v. Le Breton, 1512.
Sanderlin v. Baxter, 127.
Sanders v. Ellington, 57.
Sanders v. McMillian, 405, 406, 413.
Sanders v. Martin, 147.
Sanders v. Partridge, 513.
Sanders v. Ransom, 1253.
Sandford v. McLean, 1159.
Sands v. Stagg, 797, 801, 807.
Sanford v. Harvey, 469.
Sanger v. Chesapeake & O. R. Co., 151.
Sargent v. Ballard, 1143.
Sargent v. Smith, 464.
Saunders's Case, 526.
Saunders v. Blythe, 396.
Saunders v. Webber, 1479.
Saunderson v. Jackson, 1421.

[References to pages]

- Savage v. Bowen*, 1388.
Savage v. Mears, 1403.
Sawyer v. Kendall, 1106, 1107.
Sawyer v. McGillicuddy, 474.
Sawyer v. Twiss, 41, 42.
Sawyer v. Wilson, 164.
Saxton v. Webber, 921, 930.
Say v. Barwick, 1160.
Say v. Stoddard, 456.
Sayer v. Sayer, 1494.
Sayers v. Hoskinson, 523, 524.
Scales v. Alvis, 1522.
Scales v. Cockrill, 1108.
Scammon v. Campbell, 406.
Scammon v. Sawyer, 1256.
Scattergood v. Edge, 887, 928.
Scheidt v. Crecelins, 1466.
Schenck v. Ellingwood, 1495.
Schermerhorn v. Negus, 661.
Schneider v. Morris, 1200.
Schofield v. Cox, 720, 724, 725.
Schreckhise v. Wiseman, 1240, 1241.
Schrieber v. Citizens' Bank of Norfolk, 801, 802, 803, 804, 806, 1600.
Schulenberg v. Harriman, 626, 628.
Schultz v. Bower, 145.
Schultz v. Byers, 146.
Schultz v. Schultz, 1398, 1411.
Schyler v. Leggett, 467.
Schwalm v. Beardsley, 75, 147, 1253, 1255, 1256.
Sciote Fire Brick Co. v. Pond, 64.
Scofield v. Olcott, 910.
Scott v. Beutel, 127, 141, 1140, 1223.
Scott v. Bryan, 1486.
Scott v. Davis, 1496.
Scott v. Harwood, 912.
Scott v. Loraine, 579.
Scott v. McMillan, 1217.
Scott v. Moore, 117, 124, 127, 136, 137, 140, 141.
Scott v. Raub, 1078.
Scott v. Scott, 112, 444, 496, 502, 1333, 1340.
Scott v. Simons, 473.
Scott v. Thomas, 1262.
Scott v. Tyler, 654, 655, 656, 657, 658, 663.
Scratten v. Brown, 1088.
Scriber v. Smith, 1223.
Scrope's Case, 1486.
Scrugham v. Wood, 1243.
Scully v. Murray, 432.
Seaburn v. Seaburn, 612, 613, 1370, 1371.
Seager v. McCabe, 341.
Seagrave v. Seagrave, 264.
Seamond v. McGinnis, 1447.
Sears v. Dillingham, 1386.
Sears v. Hayt, 1142, 1144.
Sears v. King, 1253.
Sears v. Putnam, 936.
Sears v. Smith, 434.
Seaver v. Fitzgerald, 931, 934.
Secrest v. McKenna, 332.
Security Co. v. Snow, 1481.
Seddon v. Rosenbaum, 434.
Sedgwick v. Hollenback, 1220, 1224, 1228.
Sedgwick v. Laflin, 192.
See v. Craigen, 219, 232, 873, 955, 957.
Segar v. Edwards, 577, 605.
Seibert v. Levan, 131.
Seidensparger v. Spear, 165, 167.
Selb v. Montague, 338, 402.
Selby v. Greaves, 101.
Selden v. Camp, 467.
Selden v. Coalter, 1379.
Selden v. Del. Canal Co., 167.
Selden v. Keen, 655.
Selden v. Kennedy, 327.
Sellers v. Reed, 832.
Sellman v. Bowen, 397, 417.
Selwin v. Selwin, 950.

[References to pages]

- Semmes v. Scmmes*, 1395.
Seneca Nation v. Knight, 74.
Sergeant v. Denby, 804.
Sergeson v. Sealey, 1495.
Seton v. Slade, 1423, 1438.
Sewall v. Wilmer, 1488.
Seward v. Miller, 794.
Sexton v. Chicago Storage Co., 509.
Sexton v. Pickering, 364, 368, 1169, 1201.
Sexton v. Wheaton, 1281.
Seymor's Case, 210, 246, 290.
Seymour v. McKinstry, 759.
Shackleford v. Beck, 796, 798.
Shacklett v. Roller, 1398.
Shadden v. Hembree, 922.
Shadrack v. Woodfolk, 1564.
Shaffer v. Richardson, 360.
Shakespeare v. Alba, 435.
Shank v. Lancaster, 364, 1119, 1195, 1196.
Shannon v. Bradstreet, 1496.
Sharitz v. Moyers, 774, 794, 977.
Sharon Iron Co. v. Erie, 645.
Sharp v. Kern, 568.
Sharp v. Ropes, 1214, 1215.
Sharp v. Sharp, 1378.
Sharp v. Shenandoah Furnace Co., 1112, 1119, 1120.
Sharp v. Speir, 1517.
Shattuck v. Lovejoy, 504.
Shaw v. Bowman, 59.
Shaw v. Coffin, 664.
Shaw v. Farnsworth, 445.
Shaw v. Hoffman, 455, 456.
Shaw v. Loud, 1202.
Shaw v. Vincent, 377.
Sheafe v. O'Neil, 395.
Shearer v. Shearer, 26.
Shearman v. Hicks, 1460, 1484.
Shee v. Hale, 667, 877.
Shee v. Manhattan Co., 704.
Sheffey v. Gardiner, 1228.
Sheffield v. Orrery, 887.
Shelburn v. Inchiquin, 1301.
Shelby v. Guy, 1099.
Shelley's Case, 269, 843, 844, 845, 847.
Shelley v. Nash, 394.
Shelton v. Ficklin, 33, 35, 37, 38, 39, 44, 46.
Shelton v. Homer, 1479.
Shenandoah Val. R. Co. v. Miller, 803.
Shepherd v. Commings, 466.
Shepherd v. Henderson, 1300, 1457.
Sheppard v. Turpin, 1132, 1289.
Shepperson v. Shepperson, 389.
Sherman v. Shaver, 789.
Sherman v. Willett, 53.
Sherman v. Williams, 482, 499.
Shermer v. Beale, 1307.
Shermer v. Shermer, 941.
Sherrard v. Western Hospital, 666.
Sherred v. Cisco, 134, 148.
Sherwood v. Moelle, 1332.
Shickell v. Berryville Land & Imp. Co., 749.
Shields v. Anderson, 1277.
Shields v. Batts, 395, 396.
Shields v. Titus, 117.
Shindelbeck v. Moon, 472.
Shipe v. Repass, 760.
Shires v. Glascock, 1390.
Shirley v. Crabb, 134.
Shirley v. Stratton, 1440.
Shirras v. Caig, 700.
Shivers v. Goar, 1413.
Shoemaker v. Walker, 317.
Shoenberger v. Lyon, 122.
Sholter's Appeal, 1489.
Shoot v. Galbreath, 417.
Short v. Smith, 1395.
Shortridge v. Catlett, 1541.
Shotwell v. Sedam, 390.
Showalter v. Showalter, 381, 385.
Shugart v. Thompson, 1452.

[References to pages]

- Shultz v. Hansbrough, 679, 680, 762.
 Shurtz v. Johnson, 748.
 Shurtz v. Thomas, 392.
 Shuttleworth v. Le Fleming, 88.
 Siddall's Estate, 931.
 Siddons v. Short, 124.
 Sigourney v. Munn, 26, 314.
 Silsby v. Stockle, 1528.
 Silsby v. Trotter, 64, 87.
 Silverwood v. Latrobe, 158.
 Simar v. Canaday, 345.
 Sinkin v. Ashurst, 461.
 Simmerman v. Songer, 1269, 1368, 1369.
 Simmons v. Lyle, 398, 399, 414, 1518, 1544.
 Simmons v. Spratt, 1175, 1201.
 Simpson v. Boston & M. R. R., 123.
 Simpson v. Walker, 1393.
 Sims v. Everhardt, 1158.
 Sims v. Sims, 566, 567, 568, 1377.
 Sinclair v. Quackenbush, 72.
 Singer Mfg. Co. v. Lamb, 1158.
 Sinton v. Boyd, 831.
 Sinton v. Butler, 474.
 Sioux City Terminal R. Co., v. Trust Co., 930.
 Sioux City & St. P. R. Co. v. Singer, 667.
 Sip v. Lawback, 392.
 Sipe v. Earman, 1288.
 Sisson v. Hibbard, 36.
 Siter v. McClanachan, 694, 735, 737, 738, 1169, 1433, 1593.
 Skally v. Shute, 507.
 Skeate v. Beale, 1162.
 Skeen v. Rickey, 32.
 Skinner v. Wilder, 22.
 Skipwith v. Cabell, 1378, 1394, 1408.
 Skipwith v. Cunningham, 775, 1192, 1240, 1242, 1243, 1288, 1289, 1290, 1311.
 Slack v. Bird, 831.
 Slater v. Maxwell, 1441, 1527.
 Slater v. Moore, 1284, 1308, 1584.
 Slaughter v. Cunningham, 1157.
 Sleigh v. Strider, 1078, 1079.
 Sloan v. Lawrence Furnace Co., 63, 123.
 Slocum v. Seymour, 51.
 Sloniger v. Sloniger, 396.
 Slornan v. Walker, 668.
 Slow v. Tift, 311.
 Small v. Proctor, 307.
 Small v. Small, 836, 1369.
 Swallowood v. Mercer, 1436.
 Smiles v. Hastings, 126.
 Smiley v. Wright, 392.
 Smith's Appeal, 829.
 Smith v. Addleman, 406.
 Smith v. Agawam Canal Co., 70.
 Smith v. Ashton, 1494.
 Smith v. Barham, 49, 52.
 Smith v. Barrie, 667.
 Smith v. Bell, 942.
 Smith v. Bowe, 1495, 1496.
 Smith v. Bradford, 1299.
 Smith v. Brannan, 628.
 Smith v. Camelford, 884, 1463.
 Smith v. Champney, 53.
 Smith v. Chapman, 220, 232, 233, 620, 956, 957, 960, 1255, 1256, 1517.
 Smith v. Cherrill, 1295.
 Smith v. Clark, 668.
 Smith v. Collyer, 539.
 Smith v. Cooley, 93.
 Smith v. Cox, 1542.
 Smith v. Curtis, 1487.
 Smith v. Death, 1502.
 Smith v. Evans, 1380.
 Smith v. Goulding, 166, 167.
 Smith v. Griffin, 126.
 Smith v. Hardesty, 1463.
 Smith v. Henkel, 765, 1267.
 Smith v. Henning, 1466.
 Smith v. Hornback, 1105.

[References to pages]

- Smith v. Houseman, 1417.
 Smith v. Johnston, 53.
 Smith v. Jones, 1387, 1424.
 Smith v. Kerr, 449, 478.
 Smith v. Lancaster, 439.
 Smith v. Langewald, 140.
 Smith v. Loyd, 742, 1304.
 Smith v. McCorkle, 1102.
 Smith v. McIntyre, 1466, 1474.
 Smith v. Mapleback, 1333.
 Smith v. Marrable, 438, 477.
 Smith v. Maryland, 72.
 Smith v. Mawhood, 1264.
 Smith v. Miller, 598.
 Smith v. Mundy, 481.
 Smith v. Packhurst, 356, 357.
 Smith v. Pendell, 889.
 Smith v. Perry, 1078.
 Smith v. Price, 49, 52.
 Smith v. Raleigh, 507.
 Smith v. Rice, 836.
 Smith v. Richards, 1266.
 Smith v. Rome, 524.
 Smith v. Seattle, 145.
 Smith v. Smith, 349, 404, 1021, 1157.
 Smith v. Spiller, 1308.
 Smith v. Surman, 52.
 Smith v. Towers, 666.
 Smith v. Turley, 572.
 Smith v. Usher, 869.
 Smith v. Washington City V. M.
 & G. S. R. Co., 604, 706, 715, 716,
 751.
 Smith v. Whitney, 40.
 Smith v. Yule, 1595.
 Smith Paper Co. v. Servin, 38.
 Smithwick v. Ellison, 42.
 Smyth, Ex parte, 258, 259, 260, 488,
 492, 493.
 Smyth v. Carter, 521.
 Smythe v. Smythe, 201, 654, 1474.
 Snavelly v. Pickle, 683, 687, 688,
 696, 705.
 Snedeker v. Warring, 34, 35, 38.
 Sneed v. Atherton, 1032.
 Sneed v. Sneed, 1496.
 Snell v. Levitt, 136.
 Snell v. Snell, 1489.
 Snelson v. Franklin, 1440.
 Snider v. Lackenour, 1242.
 Snoddy v. Haskins, 1130, 1132,
 1293.
 Snodgrass v. Reynolds, 483, 499.
 Snow v. Boycott, 251.
 Snow v. Parsons, 67, 69.
 Snow v. Perkins, 42.
 Snyder v. Grandstaff, 385, 583, 950,
 1284, 1297, 1587.
 Sobey v. Brisbee, 434.
 Sohler v. Eldredge, 491.
 Sohler v. Trinity Church, 157, 158.
 Somerset v. Fogwell, 120.
 Somerville v. Wimbish, 86.
 Sommers v. Ward, 1526.
 Sunday's Case, 219, 873, 955.
 Southall v. Farish, 1266.
 Southard v. Central R. Co., 201,
 668.
 Southby v. Stonehouse, 1167.
 Southern v. Wollaston, 932.
 Southern Pac. R. Co. v. Dufour, 77.
 Southern R. Co. v. Franklin & P.
 R. Co., 1436.
 Southern R. Co. v. Glenn, 604, 605.
 Southern R. Co. v. Gregg, 1306,
 1310, 1311.
 Southwest Virginia Mineral Co. v.
 Chase, 60.
 Spackman v. Steidel, 140.
 Spader v. Lawler, 701, 702.
 Spalding v. Bradley, 1332.
 Spaulding v. Abbott, 117.
 Spence v. Bagwell, 1289.
 Spence v. Repass, 1296.
 Spencer's Case, 486, 510, 511, 512,
 630, 1212, 1213, 1216.
 Spencer v. Ford, 1242, 1243.
 Spencer v. Moore, 1365.

[References to pages]

- Spencer v. Weston, 397.
 Spengler v. Snapp, 1585.
 Spicer v. Martin, 1214, 1215.
 Spiller v. Andrews, 417.
 Spiller v. Wells, 802.
 Sponable v. Woodhouse, 1531.
 Sprague v. Stone, 1400.
 Sprague v. Worcester, 70.
 Sprigg v. Bank of Mt. Pleasant, 683.
 Spring Garden Bank v. Hurling's Lumber Co., 936.
 Springer v. United States, 1527.
 Springle v. Shields, 377.
 Sprinkle v. Hayworth, 565, 1377.
 Spurrier v. Fitzgerald, 1432.
 Squire v. Harder, 567.
 Staats v. Board, 620.
 Stace v. Bumgardner, 222.
 Stafford v. Buckley, 82.
 Stafford v. Coyney, 1511.
 Stafford v. White, 1304.
 Stainback v. Bank of Va., 1484.
 Staines v. Morris, 1342.
 Stall v. Wilbur, 49, 52.
 Stambaugh v. Yates, 53.
 Stamper v. Sunderland, 438.
 Standen v. Standen, 1487.
 Standifer v. Swann, 1509.
 Stanley v. Stanley, 840.
 Stapilton v. Stapilton, 1439, 1452.
 Staples v. Emery, 42.
 Star v. Rooksby, 147.
 Starke v. Littlepage, 1276.
 Starr v. Child, 74.
 State v. Atherton, 1513.
 State v. Bank of Tennessee, 1041.
 State v. Burt, 63.
 State v. Goodnow, 45.
 State v. Mantz, 1541.
 State v. Martin, 510.
 State v. Mason, 1284.
 State v. Mathews, 1521.
 State v. Phosphate Co., 71.
 State v. Pottmeyer, 78.
 State v. Rawson, 1221.
 State v. Sargent, 1526.
 State v. South Amboy, 1514.
 State v. Suttle, 140.
 State v. Trask, 1510.
 State v. Travis County, 1514.
 State Sav. Bank v. Kercheval, 34, 35, 38.
 State Sav. Bank v. Stewart, 1251, 1579, 1592.
 Steadman v. Handy, 1435, 1436.
 Stearns v. Beckham, 1155, 1440, 1442, 1453.
 Stearns v. Richmond, City of, 145, 146.
 Stebbins v. Bruce, 722.
 Steed v. Hinson, 486.
 Steele, In re, 252.
 Steele v. La Frambois, 319.
 Steele v. Livesay, 1484.
 Steele v. Mart, 440.
 Steele v. Sioux Valley Bank, 1331.
 Steele v. Steele, 401.
 Steere v. Steere, 572.
 Steere v. Tiffany, 136, 137.
 Steffens v. Earle, 469.
 Stegall v. Stegall, 360.
 Stein v. Burden, 66, 67, 68.
 Stein v. Dahm, 136, 140, 161, 168.
 Steinman v. Vicers, 258.
 Steinmeyer v. Steinmeyer, 728.
 Stelle v. Carroll, 336.
 Stelz v. Schreck, 993.
 Steminger v. Williams, 434, 435.
 Stephens v. Cooper, 731.
 Stephens v. Stephens, 949.
 Stephens v. Tineman, 1294, 1451.
 Sterger v. Van Sicklen, 474.
 Sterling v. Baldwin, 51.
 Sterling Hydraulic Co. v. Penlington, 267, 1000.
 Sterling Hydraulic Co. v. Warden, 160, 161, 163, 164, 165, 168.

[References to pages]

- Stetson v. Kempton*, 1528.
Stevens v. Bittridge, 853.
Stevens v. Kelley, 78.
Stevens v. Lawton, 221.
Stevens v. McCormick, 1029, 1034, 1036.
Stevens v. Rose, 528.
Stevens v. Smith, 266, 343.
Stevens v. Stevens, 166, 167, 413, 923.
Stevens v. Taylor, 646.
Stevens v. Thompson, 1002.
Stevens v. Van Clieve, 1155.
Stevens v. Winship, 246, 247, 1466.
Stevenson v. Henkle, 1521, 1546.
Stevenson v. Wallace, 132.
Stewart v. Chadwick, 395.
Stewart v. Doughty, 49, 53.
Stewart v. Hartman, 125.
Stewart v. Lipscomb, 1364.
Stewart v. Lisenard, 1155.
Stewart v. Long Island R. Co., 508, 509, 510, 512.
Stewart v. Preston, 720.
Stickney's Will, In re, 901.
Stillman v. Flenniken, 44.
Stimpson v. Bishop, 679, 720.
Stimson v. Thorn, 412.
Stinchcomb v. Marsh, 1195, 1196.
Stinson v. Sumner, 372, 373, 1231.
Stockbridge Iron Co. v. Hudson Iron Co., 64, 87, 196.
Stocker v. Berney, 1099.
Stocker v. Foster, 1497.
Stockport Water Works Co. v. Potter, 68, 1147.
Stockton v. Cook, 722.
Stockwell v. Campbell, 38.
Stockwell v. Hunter, 31, 438, 495.
Stockwell v. Phelps, 55.
Stoddard v. Emery, 517.
Stokely v. Slayden, 268.
Stokes v. Moore, 1423.
Stokes v. Payne, 1465.
Stokes v. Russell, 1212.
Stokes v. Upper Appomatox Co., 132, 1137, 1140.
Stokes v. Van Wyck, 193, 837, 838, 854, 855, 883.
Stoll v. Franey, 1272.
Stone v. Keeling, 1078.
Stone v. Nicholson, 876, 938, 939, 960.
Stone v. Sledge, 1201.
Stonebraker v. Hicks, 1296.
Stoner v. Harris, 759.
Stonestreet v. Doyle, 611, 612, 975, 1103.
Stoney v. Bank of Charleston, 392.
Stoney v. Shultz, 707.
Stony Creek Lumber Co. v. Fields & Co., 672.
Storrs v. Benbow, 936.
Story v. Odin, 152.
Story v. Windsor, 1591.
Stott v. Rutherford, 498.
Stoughton's Appeal, 63, 79.
Stoughton v. Leigh, 63, 317, 340, 413, 525.
Stout v. Jackson, 1232.
Stout v. Stout, 930.
Stow v. Steel, 332.
Strafford v. Wentworth, 259, 260, 493.
Stratford v. Bosworth, 1422.
Strathmore v. Bowes, 350, 1273.
Stratton v. Best, 972.
Straughan v. Wright, 1027.
Straus v. Bodekers, 774.
Straus v. Rost, 829.
Strayer v. Long, 393.
Streatfield v. Streatfield, 384.
Strider v. Reid, 688.
Stringfellow v. Tennessee Coal, Iron & Railroad Co., 1102.
Strother v. Mitchell, 1020, 1022.
Strong v. Clem, 346, 396, 408.
Strong v. Converse, 338, 402, 726.

[References to pages]

- Strong v. Doyle*, 42.
Stuart v. Clark, 71, 74.
Stuart v. Coalter, 1027.
Stuart v. Hamilton, 777.
Stuart v. Pennis, 17, 49, 51, 1231, 1419, 1420.
Stubbs v. Sargon, 611.
Stucke v. Milwaukee & M. R. Co., 150.
Stuckey v. Keefe, 989.
Studholme v. Hodgson, 950.
Studholme v. Mandell, 650.
Stukeley v. Butler, 51.
Stull v. Rich Patch Iron Co., 1119, 1120, 1121, 1123, 1124, 1126, 1127.
Stults v. Brown, 767.
Stultz v. Dickey, 59.
Stump v. Findlay, 246.
Sturdivant v. Birchett, 1390.
Sturgeon v. Wingfield, 435, 1504.
Sturges v. Bridgman, 152.
Sturges v. Carter, 1549.
Stuyvesant v. Davis, 646.
Stuyvesant v. Mayor, 201, 662.
Stuyvesant v. Woodruff, 1143.
Styles v. Weir, 1525.
Suffield v. Brown, 131, 132.
Sullens v. Railway Co., 70.
Sullivan v. Gum, 1569, 1570.
Sullivan v. Jones, 36.
Sullivan v. Royer, 152.
Sullivan v. Zeiner, 1148.
Sully v. Schmitt, 507.
Sulphur Mines Co. of Va. v. Thompson, 167, 169, 301, 1103, 1112, 1119, 1120, 1121, 1123, 1124, 1197, 1461.
Summers v. Darne, 311.
Summers v. Donnell, 414.
Summers v. Roos, 701.
Sumner v. Hampson, 27, 314.
Sumner v. Partridge, 273, 276, 326.
Supervisors of Bedford Co. v. Bedford High School, 663, 1215, 1217.
- Surburban Co. v. Turner*, 837, 890.
Surget v. Arighi, 482, 499.
Susquehanna, etc., Coal Co. v. Quick, 1108, 1230.
Sutherland v. Mard, 687.
Sutliff v. Atwood, 101.
Suttle v. Richmond, F. & P. R. Co., 581, 708, 742, 1114, 1311, 1373, 1508, 1509.
Sutton v. Head, 1217.
Sutton v. Mandeville, 500.
Sutton v. Stone, 1541.
Sutton v. Sutton, 1218, 1443.
Suydam v. Jackson, 450, 478, 526.
Swain v. Mizner, 439.
Swain v. Seamens, 1505.
Swaine v. Perine, 254, 338, 349.
Swansborough v. Coventry, 128.
Sweaney v. Mallory, 392.
Swedish, etc., Bank v. Ins. Co., 133.
Sweeney v. Warren, 1466.
Sweetapple v. Bindon, 277, 278, 328, 331.
Swett v. Cutts, 155.
Swift v. Calnan, 148.
Swindon Waterworks Co. v. Wilts & C. Navigation Co., 68.
Switzer v. Switzer, 368, 388, 389.
Sydnor v. Sydnor, 963.
Sykes v. Chadwick, 1298.
Sykes v. Sykes, 315, 323.
Sylvester v. Ralston, 459.
Syms v. Mayor, 425.
Tabb v. Baird, 1264.
Tabb v. Binford, 1206.
Tabb v. Com., 1532, 1544.
Tabor v. Foy, 723.
Taggart v. Warner, 141.
Tainter v. Clark, 1481.
Talamo v. Spitzmiller, 432.
Talbot v. Talbot, 1070, 1076.
Taliaferro v. Burwell, 293.

[References to pages]

- Taliaferro v. Day*, 1311.
Taliaferro v. Minor, 591.
Talley v. Robinson, 1161, 1200, 1453.
Tallmadge v. East River Bank, 1215.
Tallman v. Coffin, 511.
Tallman v. Murphy, 507.
Taltarum's Case, 226.
Tampa Water Works Co. v. Cline, 66, 76, 77.
Tamworth v. Ferrers, 528.
Tapia v. De Martini, 701, 702.
Tapling v. Jones, 151.
Tarback v. Tarback, 921.
Tardy v. Creasy, 114, 509, 1214.
Tarpley v. Gunnaway, 335.
Tarrant v. Cord, 1169, 1575.
Tate v. Commercial Bldg. Ass'n, 1276.
Tate v. Fratt, 147.
Tate v. Liggat, 584, 676, 1278, 1280, 1581, 1585.
Tate v. Talley, 219, 232, 956, 957.
Tatum v. Tatum, 1276.
Tax-Sale, In re, 1549.
Taylor's Estate, 401.
Taylor v. Baldwin, 1002.
Taylor v. Barham, 599, 600.
Taylor v. Benham, 24, 592.
Taylor v. Browne, 385.
Taylor v. Burnsides, 1103, 1104, 1105, 1109, 1119, 1120, 1121, 1123, 1124, 1129.
Taylor v. Chowning, 691.
Taylor v. Cleary, 192, 193, 220, 233, 847, 848, 857, 960.
Taylor v. Com., 72, 73.
Taylor v. Cooper, 713.
Taylor v. Cussen, 368, 1166, 1169, 1201.
Taylor v. Dyches, 117.
Taylor v. Eatman, 1486.
Taylor v. Ficas, 155.
Taylor v. Fourby, 1113.
Taylor v. Forbes, 1192.
Taylor v. Glaser, 1237.
Taylor v. Hibbert, 1595.
Taylor v. Hill, 975, 1000.
Taylor v. Horde, 1099.
Taylor v. King, 583, 749.
Taylor v. Mallory, 1293.
Taylor v. Martindale, 82.
Taylor v. Millard, 141.
Taylor v. Moore, 389, 1298.
Taylor v. Netherwood, 798, 801.
Taylor v. Page, 723.
Taylor v. Preston, 727.
Taylor v. Short, 731.
Taylor v. Shum, 1342.
Taylor v. Spindle, 724, 772, 778, 1278.
Taylor v. Taylor, 865.
Taylor v. Whitehead, 144.
Teaff v. Hewitt, 33, 34, 37, 38.
Teal v. Auty, 1421.
Tempest v. Rawlings, 444.
Temple v. Temple, 1365.
Temple v. Wright, 1202, 1203.
Templeman v. Biddle, 59.
Templeman v. Steptoe, 1066, 1069, 1073.
Templeton v. Twitty, 271, 283.
Templeton v. Voshloe, 154.
Tenant v. Goldwin, 78.
Tennant v. Dunlop, 598.
Tennent v. Patton, 766, 779, 1038.
Terhune v. Elbersson, 49, 52.
Terrell v. Imboden, 1276.
Terry v. Fitzgerald, 594, 601, 749.
Terry v. McClung, 1513, 1514.
Terry v. Rodahan, 1486.
Terstegge v. First German Mutual Benevolent Soc., 494.
Tevis v. Richardson, 376.
Tew v. Jones, 459.
Tew v. Winterton, 386.
Teynham v. Webb, 884.
Thayer v. Arnold, 149.

[References to pages]

- Thayer v. Mann*, 706, 715, 716.
Thayer v. Payne, 126.
Thayer v. Thayer, 349, 350.
Thelluson v. Woodford, 928, 929, 951, 953.
Thoemke v. Fiedler, 165, 1148.
Thomae v. Thomae, 923.
Thomas v. Crout, 46.
Thomas v. Davis, 38.
Thomas v. Gaines, 1278, 1580.
Thomas v. Gammel, 364, 369, 374, 418, 1158, 1170.
Thomas v. Gregg, 1472.
Thomas v. Hayward, 510.
Thomas v. Hesse, 412.
Thomas v. Jones, 1103, 1518, 1541, 1543, 1544.
Thomas v. Nelson, 466.
Thomas v. Record, 628.
Thomas v. St. Paul's Church, 1223.
Thomas v. Soper, 1277.
Thomas v. Sorrell, 161.
Thomas v. Stuart, 1564, 1565, 1575.
Thomas v. Thomas, 139, 254.
Thomas v. Von Kapff, 510.
Thomas v. Wyatt, 1202.
Thomason v. Anderson, 221, 968.
Thompson v. Bird, 727.
Thompson v. Brown, 592, 600.
Thompson v. Camper, 1110.
Thompson v. Cochran, 333.
Thompson v. Crocker, 70.
Thompson v. Davenport, 687, 688, 715.
Thompson v. Davies, 1441.
Thompson v. Gregory, 120.
Thompson v. Guthrie, 1232.
Thompson v. Jackson, 1302.
Thompson v. Leach, 324.
Thompson v. Maddux, 723.
Thompson v. Morrow, 404, 405, 406.
Thompson v. Murray, 309.
Thompson v. Norris, 1497.
Thompson v. Pendell, 112, 496, 542.
Thompson v. Rose, 511.
Thompson v. Sheppard, 1258.
Thompson v. Smith, 1453.
Thompson v. Thompson, 307, 308, 727.
Thompson v. Vance, 315.
Thorington v. Smith, 1453.
Thornborough v. Baker, 683.
Thorndike v. Camden, 1521.
Thorndike v. Reynolds, 1376, 1484, 1485, 1489.
Thornett v. Haynes, 1441.
Thornton v. Burch, 54.
Thornton v. Grant, 1090.
Thornton v. Thornton, 973, 989, 990, 991.
Thorp v. Thorp, 644.
Thrasher v. Ballard, 1463, 1464, 1494.
Threlkeld v. Campbell, 1302.
Threlkeld v. Fitzhugh, 1231, 1232.
Throckmorton v. Throckmorton, 583.
Thurber v. Dwyer, 468.
Thurber v. Martin, 67, 1147.
Thursby v. Plant, 575.
Thurstun v. Hancock, 146.
Thwaytes v. Dye, 1465.
Tibbetts v. Horne, 36, 37.
Tichanal v. Roe, 1102.
Tichenor v. Allen, 1279.
Ticknor v. McClelland, 53.
Tift v. Horton, 33, 35, 37, 44.
Tillotson v. Kennedy, 479.
Tillotson v. Mitchell, 1596.
Tillotson v. Smith, 66.
Timberlake v. Graves, 938.
Timberlake v. Moore, 743.
Timberlake v. Parish, 864.
Tinicum Fishing Co. v. Carter, 88, 115.
Tinker v. Forbes, 117.
Tinsley v. Anderson, 777.

[References to pages]

- Tinsley v. Jones*, 219, 232, 873, 939, 955, 957, 960.
Tobey v. Moore, 901.
Tod v. Baylor, 364, 368, 404, 406, 418, 1169.
Tod v. Winchelsea, 1390.
Todd v. Flight, 473.
Todd v. Gee, 1456.
Todd v. Sykes, 1285.
Tolle v. Correth, 67.
Tollet v. Tollet, 1494, 1496.
Tolman v. Sparhawk, 1113.
Tomlinson v. Dilliard, 1069.
Tomlinson v. Nickell, 289, 293, 963, 1477, 1490.
Tompkins v. Mitchell, 574.
Tompkins v. Powell, 583.
Toomes v. Slade, 682.
Topham v. Duke of Portland, 1497.
Torrey v. Minor, 392.
Tourville v. Naish, 1588, 1590, 1591.
Towles v. Burton, 1377.
Towles v. Fisher, 1487.
Town v. Hagen, 169.
Towne v. Fiske, 43.
Towner v. Lucas, 683.
Townley v. Bedwell, 570.
Townley v. Sherborne, 598, 599, 604.
Townsend v. Outten, 1210, 1211, 1233, 1324, 1506.
Townsend v. Tickell, 1192.
Townsend v. Walley, 1467, 1469.
Townsend v. Ward, 727.
Townshend v. Thompson, 707.
Tracy v. Atherton, 125, 1138, 1140.
Tracy v. Rede, 1547.
Trammell v. Trammell, 166.
Transportation Co. v. Wheeling, 1516.
Trask v. Trask, 1240.
Traute v. White, 148.
Treat v. Dorman, 52.
Tremper v. Hemphill, 1309.
Trent v. Cartersville Bridge Co., 86.
Treport's Case, 451, 899.
Tress v. Savage, 468.
Trevett v. Prison Ass'n of Va., 67, 69.
Trevivan v. Lawrence, 1504.
Trible v. Frame, 460.
Trice v. Kayton, 1223.
Trinkle v. Jackson, 1445.
Triplett v. Allen, 1303, 1445.
Triplett v. Romine, 1283, 1294, 1295.
Tripp v. Hasceig, 49, 52.
Troth v. Robertson, 890.
Trotter v. Cassady, 1103, 1120.
Trotter v. Hughes, 727.
Trout v. Pratt, 1497, 1499.
Truell v. Tyson, 1489.
Trumbull v. Trumbull, 315.
Trusdell v. Green, 1549.
Trustees v. Bigelow, 157.
Trustees v. Youmans, 77.
Trustees of Franklin St. Church v. Davis, 796, 799, 807.
Trustees of the Gen'l Assembly of the Presbyterian Church v. Guthrie, 612, 613, 1371.
Trustees, etc., v. Hoboken, 1511, 1512.
Trustees of Hollis' Hospital & Hague's Contract, In re, 901.
Tuckahoe Canal Co. v. Tuckahoe & J. R. R. Co., 83, 86.
Tucker v. Cocke, 1301, 1446, 1448.
Tucker v. Moreland, 1156, 1157, 1158.
Tucker v. Sandidge, 1363, 1364, 1389.
Tucker v. Thurston, 681.
Tucker v. Tucker, 349.
Tucker v. Vance, 395.
Tucker v. Whittlesy, 1527.
Tucker v. Wilson, 690.

[References to pages]

- Tuggle v. Berkeley*, 640, 686, 687, 688.
Tullitt v. Tullitt, 535.
Tully v. Harloe, 701.
Tunis v. Grandy, 444, 499, 507.
Tunstall v. Christian, 132, 144, 146, 152, 1148.
Tunstall v. Withers, 766.
Turk v. Ritchie, 703.
Turnbull v. Mann, 705, 706, 717.
Turner v. Barraud, 890.
Turner v. Doe, 460.
Turner v. Hart, 132, 1146.
Turner v. Kerr, 689.
Turner v. Meyers, 263.
Turner v. Stephenson, 1120.
Turner v. Stip, 1248, 1568, 1574, 1575.
Turner v. Street, 384.
Turner v. Thompson, 129, 152.
Turner v. Turner, 82, 715.
Turpin v. Saunders, 479, 1099, 1109, 1119, 1124, 1125.
Tuttle v. Eskridge, 977.
Tuttle v. Robinson, 44.
Tuttle v. Walker, 123.
Twyman v. Hawley, 454, 462.
Twynam v. Pickard, 516.
Twyne's Case, 1274, 1275, 1277.
Tyack v. Berkeley, 222.
Tykes v. Smith, 1167.
Tyler v. Herring, 588.
Tyrringham's Case, 90, 92, 95, 96.
Tyson v. Post, 45.

Udell v. Peak, 1102.
Ulbricht v. Eufaula Water Co., 66, 67, 68.
Underhill v. Collins, 494.
Union Bank of Maryland v. Beirne, 1481, 1484.
Union, etc., Transfer Co. v. Brunswick, 73.
Union Mut. Life Ins. Co. v. Hanford, 727.

Union Nat. Bank v. Milburn, 701, 702.
United Land Co. v. Great Eastern Ry. Co., 137.
United Soc. v. Brooks, 163, 168.
United States v. Bostwick, 449, 458, 478, 519, 521, 524.
United States v. Castellero, 64.
United States v. Gratiot, 1420.
United States v. Hove, 700.
United States v. King, 1249.
United States v. Nelson, 1194.
United States v. New Orleans, 1516.
United States v. Repentigny, 626.
University of Va. Rector, etc., v. Snyder, 802.
University v. Tucker, 524.
Upton v. Bassett, 1287.
Upton v. Townnend, 507.
Urquhart v. Brayton, 727.
Urquhart v. Clark, 1207, 1208.
Usher v. Pride, 620.
Usher v. Richardson, 391.
Utica Bank v. Mercereau, 435, 481.
Utterton v. Utterton, 1399.
Uvedall v. Uvedall, 882.

Vail v. Nelson, 1443.
Valentine's Will, In re, 1398.
Valentine v. Penny, 88.
Valley Falls Co. v. Dolan, 126.
Valliant v. Dodemede, 1513.
Van Alst v. Hunter, 1365.
Van Brunt v. Van Brunt, 910.
Van Buren v. Olmstead, 683.
Van Cleaf v. Burns, 305.
Van Doren v. Everitt, 59.
Van Duzer v. Van Duzer, 285.
Van Grutten v. Foscowell, 843.
Van Horn v. Clark, 120.
Van Horne v. Campbell, 941.
Ven Kleeck v. Dutch Ref. Church, 1410.

[References to pages]

- Van Ness v. Packard*, 29, 33, 40, 41, 48.
Van Note v. Downey, 284.
Van Osdel v. Champion, 661, 666.
Van Rensselaer v. Ball, 633.
Van Rensselaer v. Kearney, 1506, 1507.
Van Rensselaer v. Radcliff, 86, 90, 92, 95.
Vanarsdall v. Fauntleroy, 266, 268.
Vance v. Vance, 387.
Vance v. Walker, 1457.
Vandergrift v. Rediker, 149, 150.
Vanmeter v. Vanmeter, 25, 570, 624, 629, 638, 692, 1215, 1311.
Varnum v. Smith, 480.
Varrell v. Wendell, 1493.
Vasburg v. Teator, 1114.
Vashon v. Barrett, 1293.
Vashon v. Vashon, 836.
Vaughan v. Farmer, 1473.
Vaughan v. Holdeman, 43.
Vaughan v. Jones, 1069, 1159.
Vaughan v. Moore, 1243.
Vaughan v. Vaughan, 222.
Veazie v. Williams, 1441.
Veghte v. Raritan Power Co., 120.
Venable v. Stamper, 1430, 1435.
Venable v. Wabash Western Ry. Co., 347.
Venables v. Morris, 845, 846, 856, 1475, 1476.
Vernam v. Smith, 482, 498.
Vernon v. Smith, 512, 517.
Vernon v. Vernon, 1294.
Vest v. Michie, 1592.
Vetter's Appeal, 111.
Viall v. Carpenter, 135.
Vidal v. Girard, 1174, 1372.
Vigo v. Emery, 592.
Villers v. Beaumont, 1282.
Vincent v. Michel, 156.
Virginia B. & L. Co. v. Glenn, 1535, 1541, 1579.
Virginia Coal Co. v. Thomas, 1526, 1543, 1547.
Virginia Coal & Iron Co. v. Kelly, 23, 976.
Virginia Hot Springs Co. v. Grose, 69.
Virginia Iron, Coal & C. Co. v. Crane's Nest Coal & C. Co., 1250.
Virginia Mid. R. Co. v. Barbour, 1103, 1108, 1109, 1110, 1111, 1112, 1123.
Virginia Mid R. Co. v. Roberts, 1037.
Virginia Passenger, etc., Co. v. Patterson, 1245.
Virginia & T. Coal & I. Co. v. Fields, 1306, 1331, 1553.
Viterbo v. Friedlander, 478.
Vizonneau v. Pegram, 1166, 1167.
Vogelsmeier v. Prendergast, 1091.
Vogler v. Geiss, 140, 160, 168.
Vollmer's Appeal, 148, 167.
Vorhees v. McGinnis, 39.
Vorhis v. Freeman, 45.
Vought v. Vought, 1241.
Vynior's Case, 1360.
Vyvyan v. Arthur, 509, 510, 512, 515.
Waddell v. Waddell, 839.
Wade v. Brewing Co., 38.
Wade v. Colvert, 1161.
Wade v. Mallory, 254.
Wade v. Miller, 395.
Wades v. Greenwood, 1363, 1369.
Wadleigh v. Janvrin, 35, 44, 45.
Wadsworth v. Smith, 74.
Wadsworth v. Tillottson, 65, 66.
Wager v. Link, 727.
Wagner v. Hanna, 115, 116.
Wagner v. Coen, 592.
Wagstaff v. Smith, 1166.
Wahle v. Reinbach, 78.
Wainscott v. Silvers, 502.
Wait v. Baldwin, 49, 51.

[References to pages]

- Wait *v.* Wait, 264.
 Walden *v.* Bodley, 48, 621.
 Waldron *v.* Taylor, 1019.
 Walford *v.* Duchesse de Pienne, 1164.
 Walke *v.* Moore, 222, 1460, 1486, 1487.
 Walker *v.* Beauchler, 748.
 Walker *v.* Cronin, 77.
 Walker *v.* Deaver, 1223.
 Walker *v.* Herring, 1420, 1424, 1427.
 Walker *v.* Hughes, 1118.
 Walker *v.* Kelly, 377.
 Walker *v.* Neville, 417.
 Walker *v.* New Mexico & St. P. R. Co., 155.
 Walker *v.* Pierce, 148.
 Walker *v.* Schuyler, 406.
 Walker *v.* Sherman, 39, 44.
 Walker *v.* Watrous, 149.
 Walker's Case, 486, 494, 508.
 Walkers *v.* Lewis, 233, 824, 849, 858, 865, 876, 933, 934.
 Walkers *v.* Tyler, 571, 572.
 Wall *v.* Bright, 571.
 Wall *v.* Hinds, 43.
 Wallace *v.* Fletcher, 1140.
 Wallace *v.* Minor, 837.
 Wallace *v.* Scoggins, 434.
 Wallaces *v.* Treacle, 1279.
 Waller *v.* Armistead, 349, 1269, 1273.
 Waller *v.* Long, 669, 670.
 Waller *v.* Martin, 773.
 Waller *v.* Waller, 309, 1378, 1379, 1381.
 Wallis *v.* Harrison, 167.
 Walpole *v.* Lord Conway, 884.
 Walpole *v.* Oxford, 435.
 Walsh *v.* Kelly, 264.
 Walsh *v.* Lonsdale, 101.
 Walsh *v.* Wallinger, 1479, 1491.
 Walsh *v.* Wilson, 403.
 Walsh *v.* Young, 1159.
 Walsingham's Case, 210.
 Walters *v.* Hutchins, 523.
 Walters *v.* Jordon, 360.
 Walton *v.* Walton, 1393, 1406.
 Walton *v.* Waterhouse, 502.
 Walton *v.* Wray, 40.
 Walwyn *v.* Coutts, 1242.
 Wamsley *v.* Lindenberger, 1156.
 Wanger *v.* Hipple, 1144.
 Want *v.* Stallibrass, 1489.
 Ward *v.* Arredonds, 615.
 Ward *v.* Barrows, 1466, 1498.
 Ward *v.* Bartholomew, 1107.
 Ward *v.* Carp River Iron Co., 525.
 Ward *v.* Churn, 1247.
 Ward *v.* Cochran, 1103, 1111, 1118.
 Ward *v.* Cooke, 702.
 Ward *v.* Cressnell, 1139.
 Ward *v.* Fagin, 478.
 Ward *v.* Kilpatrick, 38.
 Ward *v.* Ward, 136, 500, 1002.
 Ward *v.* Warren, 1145, 1148.
 Ward *v.* Webber, 1450.
 Warbrick *v.* Varley, 1413.
 Warden *v.* Richards, 1482.
 Ware *v.* Cann, 661.
 Ware *v.* Roland, 838.
 Ware *v.* Owens, 346.
 Waresey *v.* Perkins, 439.
 Warfel *v.* Knott, 1256.
 Warfield *v.* Castleman, 390.
 Warfield *v.* Dorsey, 1434.
 Waring *v.* Clark, 71.
 Waring *v.* Waring, 840, 888, 1066.
 Warneford *v.* Warneford, 1380.
 Warne *v.* Baynes, 1034.
 Warner *v.* Bennett, 201, 662.
 Warner *v.* Conn. Mut. Life Ins. Co., 1487.
 Warner *v.* Mason, 837, 848, 960, 961.
 Warner *v.* Southworth, 1256.
 Warren *v.* Blake, 118, 138.
 Warren *v.* Bowdran, 1105.
 Warren *v.* Chambers, 1089.

[References to pages]

- Warren *v.* Lynch, 1237.
 Warren *v.* Syme, 121, 137.
 Warren *v.* Twilley, 313.
 Warren *v.* Wagner, 449, 478, 495, 502, 507, 508.
 Warwick *v.* Warwick, 575, 1380, 1381.
 Washington *v.* Abraham, 25, 570.
 Washington City Savings Bank *v.* Thornton, 514, 1216, 1229.
 Washington Ice Co. *v.* Shortall, 71, 78.
 Washington Mills, etc., Mfg. Co. *v.* Commercial Fire, etc., Co., 122.
 Washington Natural Gas Co. *v.* Johnson, 513.
 Wasserman *v.* Metzger, 584, 585, 732, 733, 734, 736, 745, 747, 749, 750, 1588, 1589.
 Wass *v.* Bucknam, 267, 270, 1000.
 Waters *v.* Gooch, 417.
 Watkins *v.* Eaton, 1537, 1544.
 Watkins *v.* Green, 246.
 Watkins *v.* Quarles, 933.
 Watkins *v.* Robertson, 567, 570, 1261, 1262.
 Watkins *v.* Tucker, 123.
 Watkins *v.* Young, 1021, 1023.
 Watriss *v.* Cambridge Bank, 47.
 Watrous *v.* Morrison, 1113, 1114, 1115.
 Watson *v.* Billings, 1157, 1159.
 Watson *v.* Bioren, 138.
 Watson *v.* Gray, 147, 148.
 Watson *v.* Hay, 1302, 1304, 1445, 1446.
 Watson *v.* Hunter, 539.
 Watson *v.* Smith, 1272.
 Watson *v.* Watson, 287.
 Wattles *v.* South Omaha Ice & Coal Co., 496.
 Watts *v.* Ball, 277, 329.
 Watts *v.* Cole, 1349, 1351, 1354, 1475.
 Watts *v.* Johnson Corp'n, 121, 136, 137, 140, 1141.
 Watts *v.* Taylors, 897.
 Watts *v.* Watts, 500, 999, 1000.
 Watts *v.* Wellman, 1224.
 Weale *v.* Lower, 835.
 Weatherell *v.* Geering, 664.
 Weaver *v.* Barden, 1588.
 Weaver *v.* Carter, 1446, 1447.
 Weaver *v.* Crenshaw, 399.
 Weaver *v.* Gregg, 313, 346, 1035.
 Weaver *v.* Sturtevant, 395.
 Webb *v.* Boyle, 396.
 Webb *v.* Demopolis, 1103.
 Webb *v.* Hearing, 873.
 Webb *v.* Lynchburg Shoe Co., 1290.
 Webb *v.* Russell, 1212.
 Webb *v.* Trustees, 293.
 Webster *v.* Closson, 149.
 Webster *v.* Lowell, 1142, 1144, 1145, 1146.
 Weed *v.* Lindsay, 454.
 Weigmann *v.* Jones, 152.
 Weimar *v.* Fath, 1482.
 Weir *v.* Humphries, 323.
 Weir *v.* Tate, 315, 317, 420.
 Weiseman *v.* Lucksinger, 1145.
 Weis *v.* Meyer, 134.
 Weiss *v.* South Bethlehem, 1511.
 Welch *v.* Beers, 728.
 Welch *v.* Phillips, 720.
 Welch *v.* Wilcox, 143.
 Welcome *v.* Upton, 88.
 Weld *v.* Nichols, 1217.
 Welfley *v.* Shenandoah Iron, Lumber, Mine & Mfg. Co., 1276.
 Welford *v.* Beazley, 1423.
 Welles *v.* Bailey, 74, 1089.
 Welles *v.* Coles, 1283, 1570.
 Wellesley *v.* Mornington, 1497.
 Wellford *v.* Chancellor, 577.
 Wells *v.* Burbank, 1528.
 Wells *v.* Garbutt, 131.
 Wells *v.* McCall, 661.
 Welsh *v.* Taylor, 136.

[References to pages]

- Wenlinger v. Smith, 1247.
 Wentz's Appeal, 1460.
 Wertheimer v. Hosmer, 505, 645.
 Wescott v. Campbell, 405, 406.
 Wescott v. Delano, 169.
 West v. Berney, 1500, 1502.
 West v. Lassels, 493.
 West v. McKinney, 1120.
 West v. Stewart, 30.
 West v. West, 1166, 1167.
 Westfall v. Cottrills, 1249.
 West Point v. Bland, 1510, 1511.
 West Roxbury v. Stoddard, 78.
 West Virginia Transp. Co. v. Ohio
 River Pipe Line, 1217.
 Western Granite, etc., v. Knicker-
 bocker, 151.
 Western R. Co. v. Deal, 36, 40.
 Western Transp. Co. v. Lansing,
 427.
 Westhampton v. Searle, 1521.
 Westmoreland, etc., Gas Co. v.
 DeWitte, 79.
 Weston v. Weston, 43.
 Wetherbee v. Ellison, 42.
 Wethered, Ex parte, 693.
 Wethered v. Wethered, 1457.
 Wetmore v. Bruce, 121.
 Wetzell v. Rickcreek, 1219.
 Weybright v. Powell, 937.
 Whaley v. Dawson, 1036, 1038.
 Whaley v. Stevens, 116, 1146.
 Wharton v. Stoutenburgh, 434.
 Wheatley v. Baugh, 75, 76, 77, 154,
 1147.
 Wheatley v. Calhoun, 26, 27, 28,
 309, 311, 312, 314, 336, 337, 403,
 573.
 Wheatley v. Chrisman, 67.
 Wheaton v. Gates, 157, 158.
 Wheeldon v. Burrows, 131, 132.
 Wheeler v. Bramel, 1522.
 Wheeler v. Caryl, 1294.
 Wheeler v. Clark, 1146.
 Wheeler v. Earle, 494, 512.
 Wheeler v. Frankenthall, 434.
 Wheeler v. Hotchkiss, 264.
 Wheeler v. Smith, 612, 1174, 1370,
 1371.
 Wheeler v. Sohler, 1230.
 Wheeler v. Wheeler, 1271.
 Wheeler v. Wilder, 136.
 Wheeler v. Winn, 1110.
 Wheelock v. Jacobs, 77.
 Wheelwright v. Wheelwright, 1240.
 Whipple v. Foot, 49, 53.
 Whitaker v. Brown, 123.
 Whitaker v. Greer, 417.
 Whitbeck v. Cook, 1220.
 Whitby v. Mitchell, 874, 1470.
 White v. Bass, 131.
 White v. Burnley, 1118.
 White v. Collins, 854.
 White v. Cuyler, 1195.
 White v. Dobson, 1444.
 White v. Foster, 51, 52.
 White v. King, 161, 162, 168.
 White v. Land Co., 66.
 White v. Luning, 1255.
 White v. McGannon, 1453.
 White v. McPheeters, 892.
 White v. Manhattan R. Co., 161.
 White v. Maynard, 161, 439.
 White v. New York & N. E. R.
 Co., 123.
 White v. Pollock, 1240.
 White v. Proctor, 1424.
 White v. Railway Co., 140.
 White v. Stuart, 981.
 White v. Wagner, 519, 527, 534.
 White v. White, 31, 371, 390, 414.
 White v. Wilson, 714.
 White v. Williams, 1255.
 White River Turnpike Co. v. Rail-
 way Co., 85, 89.
 Whitehouse v. Cummings, 125, 126,
 130, 135.
 Whitehead v. Whitehead, 610.

[References to pages]

- | | |
|---|--|
| <p> <i>Whitelaw v. Sims</i>, 1365, 1367.
 <i>Whitesel v. Whitesel</i>, 1368.
 <i>Whitesides v. Cooper</i>, 836.
 <i>Whiting v. Brastow</i>, 38.
 <i>Whiting v. Ohlert</i>, 434.
 <i>Whiting v. Pittsburgh Opera House Co.</i>, 434.
 <i>Whiting v. Rust</i>, 1167.
 <i>Whitlock's Case</i>, 488.
 <i>Whitmarsh v. Cutting</i>, 57.
 <i>Whitney v. Allaire</i>, 430.
 <i>Whitney v. Lee</i>, 138.
 <i>Whittaker v. Perry</i>, 464.
 <i>Whitten v. Saunders</i>, 787.
 <i>Whitton v. Whitton</i>, 641.
 <i>Wickersham v. Orr</i>, 121.
 <i>Wickersham v. Savage</i>, 1479.
 <i>Wickham v. Hawker</i>, 122, 164, 1205.
 <i>Wickham v. Martin</i>, 584, 676, 1280, 1283, 1581, 1585.
 <i>Wickham v. Spike Co.</i>, 101, 484.
 <i>Wickman v. Robinson</i>, 767.
 <i>Wicks v. Scull</i>, 781.
 <i>Wigg v. Wigg</i>, 1588, 1591.
 <i>Wiggin v. Temple</i>, 1542.
 <i>Wiggin's Ferry Co. v. Railway Co.</i>, 36.
 <i>Wigglesworth v. Dallison</i>, 59.
 <i>Wigglesworth v. Steers</i>, 1161.
 <i>Wilbourn v. Shell</i>, 1395.
 <i>Wilcox v. Calloway</i>, 1591.
 <i>Wilcox v. Hines</i>, 477.
 <i>Wilcox v. Hubard</i>, 392.
 <i>Wilcox v. Randall</i>, 344.
 <i>Wilcox v. Rootes</i>, 1401.
 <i>Wilcox v. Wheeler</i>, 197, 198.
 <i>Wild's Case</i>, 95, 96, 220, 221, 968.
 <i>Wildberger v. Cheeks</i>, 1175, 1408, 1409.
 <i>Wilde v. Fox</i>, 1426.
 <i>Wilder v. House</i>, 464.
 <i>Wilder v. Ranney</i>, 1482.
 <i>Wilder v. St. Paul</i>, 137.
 <i>Wildes v. Holmes</i>, 1494. </p> | <p> <i>Wilkins v. Bevier</i>, 1596.
 <i>Wilkins v. Gordon</i>, 594, 601, 749, 751, 754.
 <i>Wilkins v. Jewett</i>, 148.
 <i>Wilkins v. Taylor</i>, 938.
 <i>Wilkinson v. Adams</i>, 237.
 <i>Wilkinson v. Farrie</i>, 475.
 <i>Wilkinson v. Proud</i>, 92.
 <i>Wilkinson v. Scott</i>, 1262.
 <i>Wilkinson v. Stafford</i>, 592.
 <i>Wilkinson v. Wilkinson</i>, 653.
 <i>Willan v. Willan</i>, 1450.
 <i>Willard v. Ames</i>, 1531.
 <i>Willard v. Tayloe</i>, 1442.
 <i>Willet v. Brown</i>, 314.
 <i>Wiley v. Norfolk Southern R. Co.</i>, 136.
 <i>Williams v. Baker</i>, 1040.
 <i>Williams v. Bolton</i>, 535.
 <i>Williams v. Burrell</i>, 1206, 1208.
 <i>Williams v. Chitty</i>, 921.
 <i>Williams v. Dakin</i>, 645.
 <i>Williams v. Earle</i>, 504.
 <i>Williams v. First Presbyterian Church</i>, 1510.
 <i>Williams v. Gibson</i>, 63, 64, 87.
 <i>Williams v. Howard</i>, 101.
 <i>Williams v. James</i>, 138.
 <i>Williams v. Jones</i>, 660.
 <i>Williams v. Lambe</i>, 336.
 <i>Williams v. Lewis</i>, 1112, 1452.
 <i>Williams v. McNemara</i>, 528.
 <i>Williams v. Owen</i>, 686, 687.
 <i>Williams v. Peyton</i>, 1524.
 <i>Williams v. Scott</i>, 1105.
 <i>Williams v. Snidow</i>, 631.
 <i>Williams v. Stonestreet</i>, 1021, 1022.
 <i>Williams v. Skinker</i>, 601.
 <i>Williams v. Tatnall</i>, 720.
 <i>Williams v. Wait</i>, 481, 482.
 <i>Williams v. Wallace</i>, 1110.
 <i>Williams v. Williams</i>, 397.
 <i>Williamson v. Beckham</i>, 280, 1167, 1484, 1496. </p> |
|---|--|

[References to pages]

- Williamson v. Codrington, 1205, 1206.
 Williamson v. Gordon, 736.
 Williamson v. Jones, 340, 538, 539.
 Williamson v. Ledbetter, 940.
 Williamson v. Payne, 1250.
 Williamson v. Paxton, 454, 462, 466.
 Williamson v. Railway Co., 44.
 Williamson v. Steele, 53.
 Williamsons v. Goodwyn, 1267.
 William & Mary College v. Powell, 692, 1298.
 Willinck v. Miles, 1570.
 Willis v. Com., 108, 109.
 Willis v. Moore, 49, 53.
 Willison v. Watkins, 248, 621.
 Willoughby v. Lawrence, 115, 121.
 Wills v. Spraggins, 1411.
 Wilmarth v. Bridges, 315.
 Wilmington Water Power Co. v. Evans, 120.
 Wilms v. Jess, 145, 146.
 Wilson v. Branch, 390, 414, 1158.
 Wilson v. Buchanan, 1132, 1293.
 Wilson v. Chalfant, 120, 166.
 Wilson v. Cochran, 1223.
 Wilson v. Davisson, 254, 255, 256, 312, 336, 337, 393, 684, 731.
 Wilson v. Doe, 1529.
 Wilson v. Duguid, 1478, 1491.
 Wilson, Ex parte, 706, 708.
 Wilson v. Graham, 568.
 Wilson v. Hatton, 438, 477.
 Wilson v. Hayward, 724.
 Wilson v. Hunter, 1113.
 Wilson v. Inloes, 1249.
 Wilson v. Langhorne, 631, 772, 836, 888, 889, 901, 950.
 Wilson v. Maddison, 222, 968.
 Wilson v. Martin, 161, 439.
 Wilson v. Maryland Ins. Co., 1465.
 Wilson v. Mason, 1479, 1482.
 Wilson v. Piggott, 1463.
 Wilson v. Smith, 1036.
 Wilson v. Spencer, 1457.
 Wilson v. Wall, 748, 750.
 Wilson v. Widenham, 1219.
 Wimbledon, etc., Conservators v. Dixon, 138.
 Wimple v. Fonda, 888.
 Wimer v. Wimer, 1027.
 Winchelsea v. Wauchope, 1390.
 Winder v. Nock, 592, 748.
 Wine v. Markwood, 219, 839, 873, 955, 960, 961.
 Wing v. Chase, 1237.
 Wing v. Gray, 41.
 Winkler v. Miller, 1332.
 Winston v. Jones, 1473.
 Winn v. Abeles, 1114.
 Winn v. Rutland, 156.
 Winslow v. Ins. Co., 39, 44.
 Winsor v. Mills, 659, 660, 663.
 Winsor v. Pratt, 1395.
 Winter, In re, 831.
 Winter v. Brockwell, 140, 161, 168.
 Winterbottom v. Ingham, 459.
 Winthrop v. Fairbanks, 123.
 Wiscot's Case, 852, 971, 985.
 Wiseley v. Findlay, 1026, 1027, 1117.
 Wiseman v. Eastman, 164.
 Wiseman v. Lucksinger, 160, 165, 166.
 Wisner v. Davenport, 1549.
 Wissler v. Hershey, 141.
 Wiswall v. Hall, 376.
 Wiswell v. Brenahan, 622.
 Withers v. Carter, 582, 735, 772, 773, 775, 1432, 1559, 1583.
 Withers v. Larrabee, 455.
 Withers v. Yeadon, 1477.
 Withy v. Mumford, 1230.
 Witter v. McNeil, 239.
 Witty v. Mathews, 478.
 Wolf v. Violetts, 679, 703.
 Wolf v. Hines, 1483.

[References to pages]

- Wolfe v. Frost*, 114, 118, 158.
Womack v. Tankersley, 1078.
Womble v. Battle, 759.
Womrath v. McCormick, 831.
Wood v. Boyd, 196.
Wood v. Dickey, 1437.
Wood v. Fowler, 78.
Wood v. Griffith, 1456.
Wood v. Holly Mfg. Co., 36.
Wood v. Keyes, 412.
Wood v. Krebsbs, 252.
Wood v. Leadbitter, 120, 160, 161, 165, 167, 168.
Wood v. Mann, 1434.
Wood v. Manley, 161, 163, 168.
Wood v. McGuire, 912.
Wood v. Michigan Air Line R. Co., 165.
Wood v. Sampsons, 1175, 1409.
Wood v. Saunders, 137.
Wood v. Seely, 392.
Wood v. Trask, 724.
Wood v. Veal, 152.
Wood v. Weepton, 1536.
Wood County Petroleum Co. v. West Virginia Transp. Co., 79.
Woodbridge v. Winslow, 1471.
Woodburn v. Wireman, 1527.
Woodbury v. Luddy, 377.
Woodbury v. Shackleford, 1540.
Woodfords v. Pendleton, 1228.
Woodman v. Pitman, 78.
Woodruff v. Adams, 31.
Woodruff v. Cook, 391.
Woodruff v. Erie Ry. Co., 480.
Woodruff v. Paddock, 140.
Woodruff v. Pleasants, 839, 935.
Wood's Case, 973.
Woods v. Boyd, 1201.
Woods v. Duval, 121.
Woods v. Early, 978, 980, 999, 1002, 1010.
Woods v. North, 1220.
Woodson v. Perkins, 699, 700, 1168.
Woodward v. Dowse, 360.
Woodward v. James, 1369.
Woodward v. Jewell, 1466.
Woodward v. Leaver, 1201.
Woodward v. Seeley, 161.
Woodward v. Sibert, 575.
Woodworth v. Bank of America, 1307.
Woodworth v. Payne, 157.
Woodyear v. Schaefer, 69.
Woolam v. Hearn, 1301.
Wooldridge v. Wilkins, 406.
Wooster v. Hunt, etc., Iron Co., 396.
Wooster v. Cooper, 1498.
Wootten v. Redds, 1251.
Worcester v. Eaton, 1157.
Workman v. Ins. Co., 18.
Wormley v. Wormley, 591.
Worsham v. Callison, 333.
Worthington v. Cooke, 493.
Wortley v. Burkhead, 737.
Wotton v. Copeland, 1029.
Wragg v. Comptroller General, 759.
Wright v. Burroughes, 516.
Wright v. Cohoon, 963.
Wright v. Denn, 194.
Wright v. Lancaster, 1202.
Wright v. Mattison, 1120.
Wright v. Minshall, 511.
Wright v. Moore, 132, 1141.
Wright v. Pucket, 1427, 1428.
Wright v. Rose, 690.
Wright v. Slavert, 432, 438, 439.
Wright v. Stanard, 1298.
Wright v. Tukey, 1511, 1513.
Wright v. Wakeford, 1380.
Wright v. Walker, 1531.
Wright v. Wright, 222, 950, 1463.
Wright v. Young, 377.
Wroten's Assignee v. Armat, 805.
Wyatt v. Harrison, 1461.
Wyatt v. Simpson, 1539.

[References to pages]

- | | |
|---|---|
| <p>Wyman <i>v.</i> Ballard, 1223.
 Wyman <i>v.</i> Oliver, 340.
 Wyndham <i>v.</i> Chetwynd, 1586.
 Wynkoop <i>v.</i> Burger, 143.
 Wynkoop <i>v.</i> Wynkoop, 159.
 Wynn <i>v.</i> Garland, 121, 166.
 Wynn <i>v.</i> Harman, 437, 1505.</p> <p>Yancey <i>v.</i> Hopkins, 1518, 1531.
 Yancey <i>v.</i> Mauck, 569, 679, 695,
 760, 766.
 Yancey <i>v.</i> Radford, 1013.
 Yancey <i>v.</i> Savannah & W. R. Co.,
 695.
 Yarborough <i>v.</i> Monday, 1239.
 Yates <i>v.</i> Clark, 1487.
 Yates <i>v.</i> Robertson, 775.
 Yeo <i>v.</i> Mercereau, 332.
 Yerby <i>v.</i> Grigsby, 588, 1424.
 Yerby <i>v.</i> Yerby, 1401, 1403.
 Yerex <i>v.</i> Eineder, 154.
 Yetzer <i>v.</i> Thoman, 1113.
 Yost <i>v.</i> Mallicotes, 1304.
 Youghiogheny River Coal Co. <i>v.</i>
 Pierce, 88.
 Young <i>v.</i> Bankier Distillery Co., 69.</p> | <p>Young <i>v.</i> Barner, 1369, 1388.
 Young <i>v.</i> Duke, 434.
 Young's Estate, 990.
 Young <i>v.</i> Kinkead, 910.
 Young <i>v.</i> Morehead, 315.
 Young <i>v.</i> Mutual Ins. Co., 1486.
 Young <i>v.</i> Nash, 1450.
 Young <i>v.</i> Paul, 377.
 Young <i>v.</i> Spencer, 521.
 Young <i>v.</i> Tarbell, 408, 409.
 Young <i>v.</i> Thrasher, 417.
 Young <i>v.</i> Young, 570, 773, 792, 889,
 892, 1233.
 Youngblood <i>v.</i> Eubank, 46.
 Youngs <i>v.</i> McClung, 714, 1302.</p> <p>Zanes Devisees <i>v.</i> Zane, 1305, 1452.
 Zeininger <i>v.</i> Schnitzeler, 148.
 Zell <i>v.</i> Raume, 463.
 Zingerling <i>v.</i> Henderson, 1533.
 Zirkle <i>v.</i> McCue, 1038.
 Zebisch <i>v.</i> Tarbell, 474.
 Zollman <i>v.</i> Moore, 991, 992, 1300.
 Zouch <i>v.</i> Willingdale, 470.
 Zouch <i>v.</i> Parsons, 1156, 1158.
 Zule <i>v.</i> Zule, 491.</p> |
|---|---|

INDEX.

[References to sections]

ABANDONMENT,

- of dedicated land, 1355.
- of easement extinguishes it, 113, 116, 1355.
 - what is, 100.
- of equity of redemption, 626.
- of judgment lien, 698.
- of leased premises, an eviction, 419.
- of mortgagee's right to foreclose, 639.
- of user affects prescriptive title, 1061.
- of vendor's lien, 683, 687, 688.

ABEYANCE,

- of freehold, 146, 368, 734, 736, 796, 824.
- of inheritance, 796.

ABSTRACT OF TITLE,

See DESCRIPTION; LIEN; RECORDATION; REGISTRY.

ACCEPTANCE,

- of deed, 1195, 1104.
 - See DEED.
- of grantee in deed poll presumed, 1104.
- of offer to dedicate, 1355.
 - See DEDICATION.
- of remainderman not a party to deed, 1104.

ACCIDENT,

- non-execution of power due to, aided, 1338.
 - See POWER.

ACCOUNT,

- filed for mechanics' lien, 715-717, 719, 721.
- of sales filed by trustee, 508, 669.
- of liens in creditor's bill to enforce lien, 699.

ACCOUNTING FOR RENTS AND PROFITS,

- See RENTS AND PROFITS.
- between coparceners, 939, 891.
- between joint tenants, 891.
- between tenants in common, 891, 922.
- in foreclosure suits, 635.
- in partition suits, 939, 962.

ACCRETION,

- alluvion as an, 1010, 1012, 1013.
- avulsion as an, 1014, 1015.
- gradual and imperceptible, 1010, 1012, 1013.
- island formed by, 1015.
- land formed by, belongs to whom, 1011, 1012, 1013, 1014, 1015.
- nature of, 1010.
- neither gradual nor sudden, 1011, 1015.
- reliction as an, 1010, 1012, 1013.
- several sorts of, 1010.
- sudden, 1014, 1015.
- title by, 1010-1015.

ACKNOWLEDGMENT,

- of bastard by father legitimates, 242, 998.
- of claimant's title stops running of statute of limitations, 1040.

[References to sections]

ACKNOWLEDGMENT—Cont'd.

of will before witnesses, 1254, 1260.
 of writings for registry,
 before alderman, 1397.
 before clerk of court, 1393, 1397.
 before commissioner in chancery, 1397.
 before commissioner of deeds, 1397.
 before court, 1142, 1397.
 before justice of peace, 1142, 1397.
 before notary public, 1142, 1397.
 before public minister abroad, 1397.
 cannot be impeached collaterally, 1398.
 certificate of, as evidence, 1393, 1397.
 form of, 1399, 309, 311, 312.
 of authenticity of deed, 1145, 1400.
 of official character of functionary, 1393, 1397.
 of fact of, 1393, 1397.
 of place of, 1393, 1397.
 of time of, 1393, 1397.
 date of, evidence of date of deed, 1134.
 defective, cured by statute, 1398.
 effect of, 1400.
 evidence of delivery of writing, 1142.
 equivalent to proof by witnesses, 1145.
 functionary taking, a party to writing, 1398.
 judicial, not ministerial, act, 1393.
 not necessary as between the parties, 1145.

ACKNOWLEDGMENT—Cont'd.

personal appearance of grantor before official to make, 1397.
 place of, 1397.
 registry within ten days after, 1391.
 should occur before deed accepted, 1145.
 void if taken by wrong official, 1397.
 within limits of official's jurisdiction, 1397.

ACRE, SALE OF LAND BY THE, 1308, 1309, 1154.

See DESCRIPTION; MISTAKE.

ACT OF GOD,

covenant to repair embraces injuries by, 416.
 injury by, not waste, 426.

ACT OF LEGISLATURE,

notice of claim arising under public, 1413.
 rule against perpetuities applied to limitations made in contemplation of, 853.
 See RULE AGAINST PERPETUITIES.

ACTION,

assignment of right of, 1226.
 dower, before assignment, a right of, 335, 337.
 dower in right of, 267.
 for infringement of water rights, 53-57, 61, 62.
 See WATER RIGHTS.
 for waste, 441, 443, 444.
 See WASTE.
 no curtesy in right of, 229, 232.
 of debt for freehold rent, 79.
 of ejectment,
 See EJECTMENT; EVICTION;
 TITLE PARAMOUNT.

[References to sections]

ACTION—Continued.

right of, necessary for prescription, 1065, 1066.

See **PRESCRIPTION**.

seisin distinguished from right of, 141.

ADMINISTRATOR C. T. A.,

See **EXECUTOR**.

statutory power in, to sell land, 1324.

ADMISSION TO RECORD,

clerk's certificate of, 1393.

as evidence of, 1393.

copying of deed in deed book not essential to, 1393.

deed kept in repository until copied, 1392.

mandamus to compel clerk to certify to, 1393.

nature of, 1393.

no appeal from clerk's refusal to certify to, 1393.

suit against clerk for failure to certify to, 1393.

suit against clerk for failure to copy deed, 1393.

ADOPTION, OF CHILD OR ADULT, 999.**ADULTERY,**

effect of husband's, upon curtesy, 227, 228.

effect of wife's, upon dower, 227, 305, 306.

ADVANCEMENT, THROWN INTO HOTCHPOT, 952-954.

See **HOTCHPOT**.

ADVERSE ACTS OF SERVIENT OWNER SUSPENDS EASEMENT, WHEN, 116.**ADVERSE POSSESSION,**
a source of title, 1021.**ADVERSE POSSESSION**—Continued.

acts amounting to, 1033, 1039.

actual or constructive, under color of title, 1041-1048.

against grantee of State, 1024.

against husband after birth of issue, 243, 244.

against one claiming by executory limitation, 1049.

against remainderman or reversioner, 1049.

against widow before dower assigned, 337.

applied in equity when, 1051-1053.

as between coparceners, 937, 1033, 1039.

as between cotenants, 887, 923, 937, 1033, 1039.

as between joint tenants, 887, 1033, 1039.

as between landlord and tenant, 212, 1033, 1039.

as between mortgagor and mortgagee, 1033, 1039.

as between tenants in common, 923, 1033, 1039.

as between trustee and cestui, 1033, 1039.

assignee of tenant by sufferance is in, 387.

constructive, aided by actual, superior to merely constructive, 1041.

constructive, under color of title, 1041-1048.

continuity of, 1027-1031.

devisee of one in, may tack possessions, 1029.

disabilities as prolonging the period of, 1022.

disability of one cotenant enures to all, 1022.

[References to sections]

ADVERSE POSSESSION—Continued.

disclaimer by tenant of landlord as origin of, 212.
 disseisor of one in, cannot tack possessions, 1031.
 distinguished from prescription, 1035.
 dowress cannot tack possessions, 1029.
 duration of, 1020, 1022, 1026.
 entry of claimant to oust one in, 1050.
 exclusiveness of, 1034, 1064.
 fraudulent, 1032.
 from mistake of boundaries, 1036.
 grantee of one in, may tack possessions, 1030.
 heir of one in, may tack possessions, 1029.
 hostile character of, 1035.
 nature of, 1025.
 negated when, 1037-1040.
 new right or title acquired by claimant, 1049.
 no, against State or municipality, 1024.
 no seisin of land whereof another is in, 229, 232.
 no, where occupant acknowledges claimant's title, 1040.
 no, where occupant's possession is consistent with claimant's title, 1039.
 no, where parties claim under same title, 1038.
 notice of, to owner, 1033, 1041.
 notorious, 1033.
 of equity of redemption, 602.
 of grantee of tenant in common as against grantor's cotenants, 1034.
 of interlock as between junior and senior grantee, 1041-1048.

ADVERSE POSSESSION—Continued.

of land covered with water, 1033.
 of minerals under surface, 19.
 of one beginning possession in privity with owner, 1033.
 of part, possession of whole when, 1041-1048.
 of widow's quarantine, 338.
 owner of surface not in, to owner of subjacent minerals, 19.
 partition suit may decide questions of, 959.
 period of, 1020, 1022.
 prolonged by claimant's disabilities, 1022, 1023.
 presumption of, from length of possession, 1035.
 privity necessary to tack possessions, 1028-1031.
 requisites for, 1025, 1033.
 senior constructive, superior to junior, 1041, 1044.
 tacking of disabilities, 1023.
 tacking of possessions, 1028-1031.
 under claim of title, 1035.
 under color of title, 1035, 1041-1048.
 without color of title, confined to actual occupancy, 1043.

AFTER ACQUIRED TITLE,

of servient tract estops grantor to deny easement, 109.
 See EASEMENT.
 priority between grantee of equitable title and grantee of, 1414.
 See PRIORITY.
 transfer of, by estoppel, 1133, 1348-1350.
 See ESTOPPEL.
 transfer of, by feoffment, 1348.
 transfer of, by lease, 1349.

[References to sections]

AFTER ACQUIRED TITLE—

Continued.
transfer of, by warranty, 1133,
1350.
transfer of, by will, 1249.
See WILL.

AGENT,

See POWER OF ATTORNEY.
auctioneer as, of buyer and
seller, 1289.
authority of, to make deed must
be under seal, 1105.
See DEED.
authority of, under statute of
frauds, 1105, 1289.
See STATUTE OF FRAUDS.
cannot purchase at tax sale, 1370.
See TAX SALE.
delivery of deed to, 1141, 1144.
filling in of blanks in deed by,
1192.
license exercisable by, when, 135.
notice to, notice to principal,
1413.
See NOTICE.
one party cannot be, for the
other, 1289.
power cannot be delegated to,
1331.
See POWER.
signature of, under statute of
Frauds, 1289.
See SIGNATURE; STATUTE OF
FRAUDS.

AGRICULTURAL FIXTURES,

32, 33.
See FIXTURE.

AID,

incident to feudal tenure, 9.
praying in, 220.

AIR, EASEMENT OF,

See EASEMENT.

AIR, EASEMENT OF—Cont'd.

acquired by grant, 127.
but not by prescription nor im-
plication, 127.
arises by estoppel when, 109.
pollution of, 103, 127.

**ALDERMAN, ACKNOWLEDG-
MENT BEFORE, 1397.**

See ACKNOWLEDGMENT.

ALIEN,

ancestor an, 967, 1001, 1002.
conveyance by, 1084.
conveyance to, 296, 1089.
dower of, 296.
dower of wife of, 296.
See DOWER.
escheat of lands of, 967.
heir an, 967, 1001, 1002.
wife of, may contract as feme
sole, 1078.

ALIEN ENEMY,

conveyance by, 1084.
conveyance to, 1089.
dower of, 296.
heir an, 992, 1001.
incompetent to be a devisee, 1246.
wife of, competent to contract,
1078.

ALIENATION,

See ASSIGNMENT; CONTRACT TO
CONVEY; CONVEYANCE; DEDI-
CATION; DEED; DEVISE; POWER;
WILL.
by tortious conveyance, 210, 371.
See TORTIOUS CONVEYANCE.
condition in restraint of, 579-588,
162.
See CONDITION.
dates from execution, not regis-
try, of deed, 704.
fines for, 12.

[References to sections]

ALIENATION—Continued.

- meaning of, 704.
- of estate for life, 208, 210.
See **LIFE ESTATE**.
- of estate for years, 371.
See **ESTATE FOR YEARS**.
- of fee simple, 162.
- of fee tail, 186, 188, 189, 190.
See **FEE TAIL**.
- of land subject to judgment lien, 703-706.
See **JUDGMENT**.
- of land subject to mortgage, 647-651.
See **DEED OF TRUST; MORTGAGE**.
- of land subject to vendor's lien, 685.
See **VENDOR'S LIEN**.
- power of.
See **POWER**.
- annexed to life estate creates
fee when, 162, 200, 208, 858, 1328.
- incidental to estate for life, 208.
- incidental to estate for years, 371.
- incidental to feuds, 4, 5, 12.
- in tenant in tail restricted, 177.

ALIENEE,

- See **PURCHASER; ASSIGNEE**.

ALLEY,

- See **EASEMENT**.
- abandonment of, 100.
- dedication of, 1353-1355.
See **DEDICATION**.
- used for light and air, as well as passage, 100.

ALLODIAL TENURE, 2, 3, 16.**ALLUVION,**

- apportionment of, 1013.
- nature of, 1010, 1012.
- title to land by, 1010, 1012, 1013.

ALTERATION,

- of building, when waste, 428.
- of course of husbandry, waste, 430.
See **WASTE**.
- of executed contract, 1190-1192.
- of executory contract, 1191, 1192.

ALTERNATIVE EXECUTORY LIMITATION, 840, 851.

- See **EXECUTORY LIMITATION**.

ALTERNATIVE REMAINDER,

- 149, 737, 872.
See **CONTINGENT REMAINDER; REMAINDER**.

ANCIENT LIGHTS, 104, 127.**ANCIENT WARRANTY,**

- See **WARRANTY**.

ANIMALS, FENCING AGAINST, 126.**ANIMUS REVOCANDI, ACCOMPANYING BURNING, ETC., OF WILLS, 1269.**

- See **WILL**.

ANNUITY,

- definition of, 66.
- descendible to heirs when named, 17.
- distinguished from rent granted, 66.
- distinguished from "interest" or "income," 66.
- dower in, 289.
- fee conditional in, 178, 194.
- no estate tail in, 178.
- not a "tenement," 66.
- not within statute de donis, 66.
- not within statutes of Mortmain, 66.
- personalty, but descends to heir, 17, 66.

[References to sections]

ANSWER IN CHANCERY,

oral contract confessed by, taken
out of statute of Frauds, 1298.
See STATUTE OF FRAUDS.

**ANTENUPTIAL CONVEY-
ANCE,**

as preventing curtesy or dower,
297, 330.
See CURTESY; DOWER.
marriage as consideration for,
1181.
See CONSIDERATION; MARRIAGE.

APARTMENT,

lease of, 365.
"lodgings" distinguished from
lease of, 365, 366.
ownership of, 23.

APPENDANT,

See APPURTENANT.
common, 72, 73, 74.
See COMMON; PROFIT A PRENDRE.
power, 1344.
See POWER.

**APPLICATION OF PAY-
MENTS, TO DEBT SECURED
BY LIEN, 661.****APPLICATION OF PURCHASE
MONEY, PURCHASER TO
SEE TO, 490-496.****APPOINTMENT UNDER
POWER,**

See POWER.
appointee within consideration
under statute of Uses, 1329.
See STATUTE OF USES.
creates estate by virtue of orig-
inal instrument, 301, 1325, 1329.
exclusive, 1319.
illusory, 1320.
non exclusive, 1319.

**APPOINTMENT UNDER
POWER—Continued.**

rule against perpetuities applied
to, 1326.
See RULE AGAINST PERPETUITIES.

APPORTIONMENT,

of alluvion, 1013.
of common, or profit a prendre,
74.
of rent granted, 90.
of rent reserved, 90, 221, 411, 412.
See RENT.

APPURTENANT TO LAND,

easements or profits a prendre
may be, 71-74, 1155.
See EASEMENT; PROFIT A PREN-
DRE.
land cannot be, 1155.
power, is coupled with an inter-
est, 1344.
is extinguished by donee's
transfer of his own interest,
1344.
See POWER.

ARREARS OF RENT, 76, 79.

See RENT.

ASSESSMENT,

See TAX; TAX SALE.
life tenant's duty to pay local,
219.
list.
See LISTING.
land sold at tax sale must fol-
low, 1365.
of taxes, relieved against if er-
roneous, 1360.

**ASSESSOR, TO LIST AND
VALUE LAND FOR TAXA-
TION, 1359.****ASSIGNEE,**

See ASSIGNMENT; PURCHASER.

[References to sections]

ASSIGNEE—Continued.

appointed under power as, of donor of power, 1323, 1329.

See **POWER**.

bound by covenant in lease when, 421, 424.

See **COVENANT**.

dower assigned to widow's, 337, 345.

dower of widow of, as against assignor's widow, 274, 275.

See **DOWER**; **PRIORITY**.

liability of, on covenant confined to time of occupancy, 1120, 423.

mention of, in covenant, 1118.

not liable on covenant broken before or after his occupancy, 423.

obligation of, to perform conditions, 544.

See **CONDITION**.

of deferred payments due vendor may subject land to lien, 642-646, 684, 702, 726.

may sue vendee, 1304.

of land subject to lien, 647-651, 685, 703-706, 724.

of land subject to mortgage not personally liable, 598.

of tenant for life or years.

acceptance of new lease by, a surrender of old one, 1218.

See **SURRENDER**.

entitled to emblements when, 44, 46, 48, 49.

See **EMBLEMENTS**.

license by, to lessor to enter for specific purpose not a surrender, 1218.

redemption of land from tax sale by owner's, 1376.

See **TAX SALE**.

ASSIGNEE—Continued.

redemption money or tax sale payable to purchaser's, 1377.

release to lessee's, 1209.

release by lessor's, 1209.

rights and liabilities of.

See **ASSIGNMENT**; **COVENANT**.

rights of vendee's, as against dower of vendee's widow, 284.

statutory power of, in bankruptcy to sell, 1324.

suit by, against remote assignor on covenant, 1131.

ASSIGNMENT,

See **ALIENATION**; **ASSIGNEE**; **CONVEYANCE**; **COVENANT**.

a secondary conveyance at common law, 1197, 1204.

apportionment of rent on, of leased premises, 412.

See **RENT**.

assignee in shoes of assignor, 1224.

assignee holding at increased rent, 1224.

by widow of her dower before it is assigned her, 337.

See **ASSIGNMENT OF DOWER**; **DOWER**.

distinguished from lease, 1200, 1224.

See **LEASE**.

formalities of, 360, 1224, 1225.

liabilities of assignee cease upon his, 1227.

nature of, 1224.

of debt secured by judgment lien, 702.

See **JUDGMENT**.

of debt secured by mechanics' lien, 726.

See **MECHANICS' LIEN**.

[References to sections]

ASSIGNMENT—Continued.

- of debt secured by mortgage, 642-646.
- See DEED OF TRUST; MORTGAGE.
- of debt secured by vendor's lien, 684.
- See VENDOR'S LIEN.
- of dower.
- See ASSIGNMENT OF DOWER; DOWER.
- of estate at will, 380.
- See ESTATE AT WILL.
- of estate by sufferance terminates it, 387.
- See ESTATE BY SUFFERANCE.
- of estate for life, 162, 208, 210.
- See LIFE ESTATE.
- of estate for years, 371.
- See ESTATE FOR YEARS.
- of fee simple, 162.
- See FEE SIMPLE.
- of fee tail, 188-190.
- See FEE TAIL.
- of land subject to judgment lien, 703-706.
- of land subject to mechanics' lien, 724.
- of land subject to mortgage or deed of trust, 647-651.
- of land subject to vendor's lien, 685.
- of lease, 421-423.
- of license, 135.
- See LICENSE.
- of naked power, 1226.
- of power coupled with an interest, 1226.
- See POWER.
- of remedies for rent, 407.
- of rent, 406, 407, 412.
- See RENT.
- of reversion.
- carries rent with it, 407, 412.
- covenants running with, 424.

2 Min. Real Prop—42**ASSIGNMENT—Continued.**

- of right of entry or action, 535-537, 1226.
- parol, sufficient at common law, 1225.
- proper words of, 1224.
- property subject to, 1226.
- rights of assignee cease upon his, 1227.
- transferor's whole estate must be assigned, 1226.
- valuable consideration not essential to, 1225.
- See CONSIDERATION.

ASSIGNMENT FOR BENEFIT OF CREDITORS,

- See CREDITOR; FRAUDULENT CONVEYANCE.
- greater ratio secured to creditor if he will assent to, fraudulent, 1166.
- preference of creditors, 1177.
- reservation by grantor of control or benefits, 1175.
- release of grantor from further liability, 1176.

ASSIGNMENT OF DOWER,

- See DOWER.
- by whom assigned, 346.
- compulsory, 351-354.
- conditional, 348.
- in land whereof husband is co-tenant, 270.
- instrument of, 347.
- judgment for dower, equivalent to, 275.
- out of dowerable land only, 349.
- relates back to husband's death, 274, 275, 355.
- setting apart of dower upon, 350, 353.
- to be recorded, 1390, 1392.
- to whom assigned, 345.

[References to sections]

ASSIGNMENT OF DOWER—

Continued.

valuation of land for purpose of,
342-344.

warranty implied upon, 347.

ATTACHMENT LIEN.

a statutory lien, 710.

commencement of, 710.

creation of, 710.

creditors secured by,

can subject only debtor's in-
terest, 710.cannot tack first mortgage and
squeeze out second mort-
gagee, 657.have no priority over defective
first mortgage, 656.

not purchasers, 595, 656.

priorities, 1407, 1416, 1418.

See CREDITOR; PRIORITY.

growing crops liable to, 43.

index part of recordation of,
questionable, 1393, 1403.recordation of, 710, 1390-1393,
1403, 1405.

See RECORDATION; REGISTRY.

**ATTAINDER OF TREASON
OR FELONY,**

See FELONY; TREASON.

effect of, upon conveyance, 1083,
1096.effect of, upon descent of land,
967.

escheat because of, 967.

ATTESTATION,clause of, appended without wit-
nesses, does not defeat holo-
graph will, 1253.

no form of, required, 1254.

of deed, 1145.

of will, 1254, 1263.

See ATTESTING WITNESS; WILL.

**ATTESTING WITNESS TO
DEED,**authentication for registry by,
1145, 1395.proof of deed by, equal to ac-
knowledgment, 1145.

See ACKNOWLEDGMENT.

proof of delivery of deed by, 1142.

proof of handwriting of, 1145.

subscription of deed by, not nec-
essary, 1145.unnecessary to validity of deed,
1145.**ATTESTING WITNESS TO
WILL,**

See WILL.

Acknowledgment of will before,
1254, 1260.attestation clause without, does
not defeat holograph will,
1253.

competency of, 1255, 1259.

conscious presence of testator,
1263.

convict as, 1255.

creditor of testator as, 1257.

devisee as, 1256.

distinguished from witness called
to prove will, 1254.

executor as, 1258.

husband of creditor of testator
as, 1257.

husband of devisee as, 1256.

mark of, a sufficient signature,
1262.meaning of, "in testator's pres-
ence," 1263.

must be present with other, 1261.

must sign in testator's presence,
1262.need not sign in presence of
other, 1261.

[References to sections]

ATTESTING WITNESS TO**WILL**—Continued.

no, required for holograph will, 1253.

no form of attestation required, 1254.

party as, 1255.

person defective in intellect as, 1255.

person defective in religious belief as, 1255.

person interested as, 1255-1258.

presence of, 1261.

signature of, made by another for him, 1262.

signature of, to appear at end of will, 1254.

signature of testator made before, 1254, 1260.

time at which competency of, is fixed, 1259.

to will in exercise of power, 1333, 1338.

wife of creditor of testator as, 1257.

wife of devisee as, 1256.

wife of person interested as, 1255.

ATTORNEY,

See AGENT; POWER OF ATTORNEY.

ATTORNMENT OF TENANT,

4, 1070.

AUCTION,

auctioneer agent for both buyer and seller at, 1289.

collusion not to bid at, not an act of part performance, 1293.

See PART PERFORMANCE.

collusion at, taints sale with fraud, 1305.

puffers at, taints sale with fraud, 1305.

AUCTION—Continued.

See FRAUD.

right of seller to make one bid at, 1305.

sale at, under deed of trust, 666.

sale at, "without reserve," 1305.

tax sale at, 1368, 1374.

AVULSION,

of seal, 1193.

title to land by, 1014, 1015.

See ACCRETION.

AWAY GOING CROPS, CUSTOM OF, 47.**BANKRUPTCY,**

grant to one until, 589.

statutory power of sale in assignee in, 1324.

See POWER.

BARGAIN AND SALE,

See CONVEYANCE; DEED; USE;

STATUTE OF USES.

appointee under power in, within consideration, 1329.

See CONSIDERATION; POWER.

conveyance by, 451, 455, 456, 466, 1231, 1232.

form of deed of, 1107.

innocent conveyance, 1344.

lease and release a form of, 455, 456, 466, 1234.

transfer under power in gross by, does not extinguish power, 1344.

use created by, 450, 451, 455, 456. valuable consideration necessary to, 450, 451, 456, 1231.

BASTARD,

capacity of, to inherit, 967, 997, 998.

deed to unborn, when void, 1087.

filius nullius at common law, 997.

[References to sections]

BASTARD—Continued.

is collateral heir of half blood, 997.

See DESCENT; HEIR.

legitimation of, 242, 998.

love for, does not support conveyance when, 1233.

may inherit on part of mother, 997.

remainder to unbegotten, void, 793.

BETTERMENT LAWS, 216.**BIDDINGS, OPENING OF**, 637.**BLANKS, FILLING IN OF**, 1105, 1192.**BOND**,

condition not to aliene land annexed to, 585.

See CONDITION.

may take effect as a will, 1251.

See WILL.

BOROUGH - ENGLISH, TENURE BY, 6.**BOTES**,

See ESTOVERS.

BOUNDARY,

See DESCRIPTION.

adverse possession from mistake of, 1036.

See ADVERSE POSSESSION; MISTAKE.

oral compromise as to, 1036.
upon streams, 60.

BUILDING,

See APARTMENT.

a fixture, 23, 24-38.

See FIXTURE.

apportionment of rent on destruction of, 90, 412, 415.

BUILDING—Continued.

distress for rent of furnished, 82.

See RENT.

erected on another's land without permission belongs to owner of land, 23.

erected on mortgaged land, 23.

fixture may be annexed to, as well as to land, 25.

license to erect on another's land, 23, 132.

See LICENSE.

ownership of, and of land severable, 23.

support of, 123.

tenant erecting, recovers no compensation for, 216.

waste in, 28.

See WASTE.

BURGAGE TENURE, 6.**BURIAL RIGHTS**, 130.**CANCELLATION**,

of deed, 1194.

of executory contract, 1194.

of lease, not a surrender, 1217.

See SURRENDER.

of signature to will, 1269.

of will, 1269.

See WILL.

CAPACITY OF ATTESTING WITNESS,

See ATTESTING WITNESS.

CAPACITY OF GRANTEE IN DEED,

exists in general, 1086.

grantee an alien, 1089.

an alien enemy, 1089.

See ALIEN; ALIEN ENEMY.

a corporation, 1090-1095.

a fiduciary, 1097.

an infant, 1086.

[References to sections]

CAPACITY OF GRANTEE IN**DEED**—Continued.

- an insane person, 1086.
- a married woman, 1086.
- See **MARRIED WOMAN**.
- attainted of treason or felony, 1096.
- dead at time of conveyance, 1088.
- insufficiently designated, 1087.
- unincorporated body, 1087.
- unborn bastard, 1087, 793.
- uncertain trustee, 1087.
- See **TRUSTEE**.

CAPACITY OF GRANTOR IN DEED,

- alien, 1084.
- alien enemy, 1084.
- attainted of treason or felony, 1083.
- corporation, 1085.
- drunken, 1076.
- infant, 1074, 1075.
- insane person, 1073.
- married woman, 308-312, 1078-1082.
- See **MARRIED WOMAN**.
- non compos mentis, 1073.
- under duress, 1077.

CAPACITY TO BE A DEVISEE, 1246, 1247.**CAPACITY TO DEVISE, 1241-1245.****CARTER v. TYLER, DOCTRINE OF, 869.****CEMETERY,**

- dedication of land for, 1353-1355.
- See **DEDICATION**.
- rights in burial lot in, 130.
- See **EASEMENT**.
- trust for, 522.
- See **TRUST**.

CERTIFICATE,

- of acknowledgment, 1393, 1397-1400.
- See **ACKNOWLEDGMENT**.
- of proof of writing by witnesses for registry, 1395.
- of registry, 1393.
- See **ADMISSION TO RECORD; RECORDATION; REGISTRY**.

CERTIFIED COPY,

- See **OFFICE COPY**.
- of court records as basis for recordation, 1394.

CESTUI QUE TRUST,

- See **TRUST; TRUSTEE**.

CESTUI QUE USE,

- See **STATUTE OF USES; USE; TRUST**.

CESTUI QUE VIE,

- See **LIFE ESTATE; OCCUPANCY**.

CHAMPERTOUS CONTRACT,

- not specifically enforceable, 1314.

CHARITY,

- dedication of land for, 1353-1355.
- See **DEDICATION**.
- defective execution of power in favor of, aided in equity, 1338.
- See **POWER**.
- devise to, 1246, 522.
- trust for, 522.

CHATTEL,

- annexed to land, 24-38.
- See **FIXTURE**.
- executory limitation in, 830.
- See **EXECUTORY LIMITATION**.
- life estate in, 357.
- losing its identity on annexation to lands, 23, 25.
- may become realty, 24.

[References to sections]

CHATTEL—Continued.

mortgage of,

See MORTGAGE.

no fee tail in, 178.

real,

See ESTATE FOR YEARS; LAND-

LORD AND TENANT; LEASE.

remainder in, 357, 830.

See REMAINDER.

recourse to, to distrein, 82.

rent does not issue out of, 82, 84.

See RENT.

CHILDREN,

as heirs, 982, 992.

See HEIRS; DESCENT.

as word of limitation in will, 154,

181, 182, 183, 195.

as word of purchase, 154, 183.

contract of parent not specifically enforceable if it leads to coercion of, 1314.

See SPECIFIC PERFORMANCE.

illusory appointment among, 1320.

power of appointment among, 1319, 1321, 1330.

See POWER.

provisions for, a consideration to support deed, 1233.

to support specific performance, 1311.

will revoked in favor of pretermitted, 1272-1274.

CHIVALRY TENURE, 6, 14.**CHURCH,**

devise to, 522, 1246.

pew in, 130.

tomb in, 130.

trust for, 522.

vault in, 130.

CITY,

adverse possession against, 1024.

as purchaser at tax sale, 1372.

CITY—Continued.

liability of, for support of land, 122.

lot described in deed, 1148-1154.

See DESCRIPTION.

treasurer,

See TREASURER; TAX; TAX SALE.

CIVIL DEATH,

no, in Virginia, 200, 1078.

of consort, does not give rise to curtesy or dower, 245, 279.

of husband allows wife to contract, 1078.

terminates life estate, 200.

CLERK OF COURT,

acknowledgment made before, 1393, 1397.

can purchase at tax sale, 1367, 1371.

but special commissioner to issue tax deed, 1367, 1371.

certificate of, as evidence of admission to record, 1393.

liable to grantee, if he fails to admit to record, 1393.

liable to creditor or purchaser, if he fails to record deed duly admitted to record, 1393.

redemption money on tax sale payable to, when, 1377.

tax-deed issued by, 1367.

See TAX-DEED; TAX SALE.

CODICIL,

See WILL.

definition of, by statute, 1239.

paper found with will, but not referring thereto, good as a, 1253.

republication of will by, 1275.

revocation of will by subsequent, 1267.

[References to sections]

COLLATERAL CONDITION,See **CONDITION.****COLLATERAL HEIRS,**See **HEIRS.****COLLATERAL POWER,**See **POWER.**

distinguished from power "simply collateral," 1344.

is a power coupled with an interest, 1344.

not extinguished by donee's transfer of his own interest, 1344.

unless by tortious conveyance, 1344.

same as a power in gross, 1344.

COLLATERAL RELATIONSHIP, DEGREES OF, 974-976.See **DESCENT; HEIRS.**

canon law rule, 974.

civil law rule, 975.

common law rule, 976.

COLLATERAL WARRANTY,

1114, 1115, 1116.

See **WARRANTY.****COLOR OF TITLE,**

adverse possession under, 1035, 1041-1048.

See **ADVERSE POSSESSION.****COMMISSIONER,**

acknowledgment before, 1397.

deed executed by special, 965.

dower assigned by, 346, 353.

of deeds may take acknowledgment, 1397.

partition made by, 962, 963.

sale made by, 635, 636, 962, 963.

COMMON, RIGHT OF,See **PROFIT A PRENDRE.****COMMON, RIGHT OF—Cont'd.**

appendent to land, 72, 73, 74.

apportionment of, 74.

appurtenant to land, 71, 72, 73, 74.

definition of, 70.

distinguished from easement, 70.

extent of, measured by needs of land, 71.

grant of, carries everything needful for enjoyment of, 70.

in gross, 71, 72, 73, 74.

is a form of profit a prendre, 70.

nature of, 70.

of estovers, 73, 74.

of gravel, 73, 74.

of minerals, 73, 74.

of pasture, 72, 74.

of piscary, 73, 74.

of turbary, 73, 74.

prescriptive title to, 1054-1068.

See **PRESCRIPTION.**

rent cannot issue out of a, 82.

COMMON FISHERY,

cannot be subject of prescription, 1057.

COMMON LAW LIMITATION,See **SPECIAL LIMITATION.****COMMON RECOVERY,**

a tortious conveyance, 210.

See **TORTIOUS CONVEYANCE.**

fee tail barred by, 188, 189, 190.

See **FEE TAIL.**

married woman's conveyance by, 308, 1079.

See **MARRIED WOMAN.**

transfer of after acquired title by, 1348.

See **ESTOPPEL.****COMMONWEALTH,**

as purchaser at tax sale, 1372.

[References to sections]

COMMONWEALTH—Cont'd.

resale by, of land bid in at tax sale, 1374.

statute of limitations applicable to grant by, 1051.

does not usually run against, 1024.

See ADVERSE POSSESSION; STATUTE OF LIMITATIONS.

COMMUTED VALUE,

of dower interest, 290, 333.

of life estate, 218.

COMPENSATION,

See DAMAGES.

act of part performance, for specific enforcement, must be incapable of, 1296.

in equity for mistake, 1184, 1187, 1188, 1307, 1308, 1309.

See MISTAKE.

in case of compromise of doubtful rights, 1188.

COMPETENCY OF PARTIES TO DEED,

See CAPACITY.

of subscribing witnesses to wills, 1255-1259.

See ATTESTING WITNESS.

COMPLETE PURCHASER,

application of doctrine of, 489, 1172, 1183, 1409, 1410.

definition of a, 1409.

doctrine of, applied to fraudulent conveyance, 1172, 1183.

See FRAUDULENT CONVEYANCE.

applied to purchaser under registry laws, 1409, 1410.

See REGISTRY.

applied to purchaser of trust estate, 489.

See TRUST; TRUSTEE.

COMPLETE PURCHASER —

Continued.

not confined to equity, but applicable in ejectment when, 1409.

illustrations of doctrine of, 1410.
purchaser, to be, must have paid the whole consideration, 1409, 1410.

received his conveyance, 1409, 1410.

without notice of the equity, 1409, 1410.

purchaser receiving notice by registry before completing purchase has lien for purchase money paid, 1409.

COMPROMISE,

as consideration,

for a deed, 1188.

to support specific performance, 1312.

effect of, when based on mistake, 1188.

oral, as to boundary line, 1036.

CONCEALMENT,

effect of, upon conveyance, 1162.

estoppel from fraudulent, 1351.

preventing payment of tax or redemption to be shown in spite of tax deed, 1386.

CONDEMNATION,

See EMINENT DOMAIN.

of franchise, 68.

registry of, in deed book, 1390, 1392.

right of dower in land after, 295.

CONDITION,

any person interested may perform 545.

appointment under power violative of, rejected, 1337.

[References to sections]

CONDITION—Continued.

assignee's obligation to perform, 544.
 assignment of dower on, 348.
 assignment of right of entry for breach of, 535, 536, 537.
 clause for, in deed or lease, 1113.
 compliance with, 530.
 conjunctive, 547, 565.
 construction of, 529, 546, 547, 825.
 construed as subsequent rather than precedent, 825.
 curtesy in estate upon, 249.
 defeasance containing, 525, 1228.
 definition of precedent, 525.
 definition of subsequent, 525.
 delivery of deed upon, 1144.
 See ESCROW.
 destroyed by surrender of possession, 1219.
 discharged by sale of land for taxes, 1385.
 disjunctive, 547, 565, 640.
 distinguished from defeasance, 525, 1228.
 dower in estate upon, 249, 267, 280.
 dowress cannot enter for breach of, in husband's lease, 355.
 effect of disclaimer under deed upon, 1195.
 effect of re-entry for breach of, 533, 542.
 effect of violation of precedent, upon equitable conversion, 20.
 excuse for nonperformance of, 555-557.
 executory limitation subject to precedent, 827, 839.
 fee simple upon, distinguished from fee qualified, 169.
 forfeiture for breach of, relieved against in equity, 591-594.

CONDITION—Continued.

illegal, 566, 567.
 implied in an exchange against eviction, 1202.
 implied in grant of estate for life, 209-212, 526.
 claim in court of record of greater estate, 211.
 disclaimer of tenure of landlord, 212.
 tortious conveyance, 210.
 implied in grant of estate for years, 371, 526.
 implied, attached to fee simple, 526.
 impossible in the conjunctive and disjunctive, 565.
 precedent, 561.
 subsequent, 562-565.
 in law, or special limitation, 540, 574, 586, 589.
 in restraint of alienation, 579-588.
 annexed to bond, 585.
 annexed to fee simple, 579-586.
 annexed to fee tail, 587, 794.
 annexed to estate for life or years, 588.
 annexed to grant to corporation, 583.
 annexed to tract other than one granted, 584.
 annexed to wife's equitable separate estate, 582.
 in form of special limitation, 586.
 in restraint of marriage, 570-577.
 annexed to conveyance or devise of land, 572.
 annexed to legacies charged on land, 573.
 annexed to legacies charged on personalty, 575-577.

[References to sections]

CONDITION—Continued.

in form of special limitation, 574.
 in restraint of trade, 569.
 in will that devisee will not contest, 1282.
 land exempted by, from liability for grantee's debts, 589.
 liability of assignee upon, in lease, 1227.
 liquidated damages, 594.
 marriage—brocage, 571.
 merger in case of estate upon, 215.
 mode of creating, 529.
 modes of re-entry for breach of, 538, 539.
 nature of, 525.
 non-compliance with, 531-539.
 penalty distinguished from remission of part of debt, 592.
 penalty relieved against in equity, 591-594.
 place of performance of, 551-554.
 power extinguished by failure of precedent, 1343.
 precedent, 525, 527, 529, 530, 531, 546.
 precedent, illegal, 567.
 precedent, impossible, 561.
 precedent, restraining marriage, 571, 572, 576, 577.
 precedent, remainder dependent on, is contingent, 742, 743.
 presumed to be subsequent rather than precedent, 743, 744.
 pro turpi causa, 568.
 quasi reversion after fee simple upon, 171.
 re-entry for breach of, 526, 532-539, 542.
 remainder subject to precedent, is contingent, 742, 743.

CONDITION—Continued.

remainder defeated by subsequent, 734, 743, 795.
 repugnant, 578-590, 794.
 reservation of right of entry for breach of, 534.
 restricting use of premises granted, 590.
 right of entry for breach of, passes with reversion, 535, 536. not otherwise assignable, 537.
 rule in Dumpor's Case, 559.
 strictness in performance of, 546, 547.
 subsequent, 525, 528, 530, 531, 540, 541, 547.
 distinguished from conditional limitation, 541-543.
 distinguished from special limitation, 169, 204, 540, 574, 586, 589.
 illegal, 567.
 impossible, 562-565.
 in restraint of marriage, 571, 572, 574, 576, 577.
 repugnant, 578-590, 794.
 tender of performance of, 556.
 that interest be punctually paid, or whole debt to fall due, 592.
 time of performance of, 545, 548-550.
 time of exercise of power, when a precedent, 1335.
 upon which fee conditional is held, 173.
 waiver of forfeiture for breach of, 560.
 waiver of performance of, 558, 559.
 who may perform, 545.
 who must perform, 544.
 whole estate, not part only, avoided by breach of, 794.
 will made upon expressed, 1251.

[References to sections]

CONDITION—Continued.

will upon condition that devisee shall not contest, 1282.

CONDITIONAL LIMITATION,

See EXECUTORY LIMITATION.

curtesy in, 250.

distinguished from condition subsequent, 541-543.

dower in, 250, 280.

CONDITIONAL SALE,

distinguished from mortgage, 605-609.

CONFIRMATION,

a secondary conveyance at common law, 1197, 1204.

definition of, 1220.

ensuring to make sure a voidable estate, 1221.

applies only to voidable, not void, estate, 1221.

no privity of estate necessary, 1221.

no words of limitation needful, 1221.

ensuring to enlarge a particular estate, 1221.

no livery necessary, 1222.

practically same as release by enlargement, 1222.

priority of estate necessary, 1222.

instances of, 1220.

of infants' conveyance, 1074.

of sale in foreclosure proceedings, 636.

of sale in partition suit, 965.

of tax-sale by court, 1373.

proper words of, 1220.

relief to persons aggrieved by court's, of tax sale, 1373.

requisites of a, 1223.

sustained as a grant, if not as a, 1223.

CONFLICT OF LAWS,

conveyance of land governed by lex situs, 1070.

law controlling what is a jointure, 324.

will of land governed by lex situs, 1254.

CONSIDERATION,

advancement of, by one other than grantee raises trust, 475, 476, 477, 479.

antecedent debt as a, for conveyance under registry law, 1408.

appointee under power within the, under statute of Uses, 1320.

cestui que use must be within the, 1230, 1232.

compromise of doubtful rights as a, 1188, 1312.

conveyance without, creates resulting trust, 469.

validity of, as to creditors, 1157, 1179.

validity of, as to purchasers, 1157, 1179.

See VOLUNTARY CONVEYANCE.

deed of trust to secure antecedent debt, a transfer for valuable, under registry law, 1408.

effect of recital in deed of payment of, 1158.

effect of want of, in deed, 1157. as between parties, 1157.

as to existing creditors, 1157, 1179.

as to subsequent creditors and purchasers, 1157, 1159.

See VOLUNTARY CONVEYANCES.

fraudulent, 1160-1184.

See FRAUDULENT CONVEYANCES. illegal, 1159.

[References to sections]

CONSIDERATION—Continued.

immoral, 1159.
 in restraint of marriage, 1159.
 in violation of public policy, 1159.
 inadequacy of, as evidence of fraud, 1163, 1174.
 involving mistake or ignorance, 1184-1188.
 See **MISTAKE**.
 lien of incomplete purchase for, paid before notice, 1409.
 marriage a valuable, 1172, 1181, 1390, 1408.
 meritorious, 1311.
 must be wholly paid to make one a complete purchaser, 1409, 1410.
 See **COMPLETE PURCHASER**.
 no, needed to support a "grant," 1201.
 nor an assignment of a lease, 1225.
 of contract to convey land need not be in writing under statute of Frauds, 1287.
 of marriage, 1172, 1181, 1390, 1408.
 effect of conveyance in, 1172.
 registry of contract in, touching land, 1390, 1391, 1392.
 of natural love and affection, 450, 451, 455, 456, 1233.
 oral promise to convey without, though partly performed, not enforceable in Virginia, 1297.
 proof of, by parol, 1109, 1232.
 purchaser for valuable or meritorious, 1310, 1311.
 See **PURCHASER; COMPLETE PURCHASER**.
 purchaser under registry law, must have paid entire, before notice of equity, 1409, 1410.
 recital of payment of, in a deed, 1109.

CONSIDERATION—Continued.

release of husband's duty to support wife as a, 1182.
 to support bargain and sale, 1230, 1232, 450, 451, 455, 456.
 to support covenant to stand seised, 450, 451, 455, 456, 1233.
 to support lease and release, 1234.
 to support specific performance of contract, 1310-1313.
 may be valuable or meritorious, 1310, 1311.
 valuable, but inadequate, 1313.
 wife's relinquishment of dower as a, 1182.

CONSTRUCTIVE TRUST, 467, 478-482.See **TRUST**.

priority between creditors and party claiming debtor's land by, 1404.

CONSTRUCTION,

of condition, 529, 546, 547, 825.
 of deed against grantor, 200, 1147.
 See **LIMITATION**.
 of provision for wife as jointure, 323, 324, 325, 327.
 of will,
 See **LIMITATION**.

CONTINGENT CURTESY,See **CURTESY; DOWER**.**CONTINGENT DOWER,**See **DOWER**.**CONTINGENT ESTATE,**

by way of executory limitation.
 See **EXECUTORY LIMITATION**.
 by way of remainder.
 See **CONTINGENT REMAINDER**.
 by way of possibility of reverter.
 See **QUASI REVERSION**.

[References to sections]

CONTINGENT INTEREST.

in members of a class, created by power completed with a trust, when, 1330.

owner of, may pass after acquired title by estoppel, 1133, 1350.

See **ESTOPPEL**.

CONTINGENT REMAINDER.

See **REMAINDER**; **LIMITATION**.

alternative, 737, 784.

attachment of, 805, 811.

awaits regular expiration of preceding estate, 734, 795.

cannot be accelerated, 783.

classes of, 741-778.

construed as vested when possible, 743.

defeated by destruction of preceding estate, 736, 780-782.

by preceding estate void in its creation, 735.

definition of, 740.

dependent on condition precedent not connected with termination of preceding estate, 742.

dependent on contingent termination of preceding estate, 742.

dependent on contingent termination of preceding estate that never takes effect, 800.

dependent on termination of preceding in designated manner, which ends otherwise, 801.

disposition of inheritance pending contingency, 796.

due to possibility of gap, 736, 739, 740, 745.

due to uncertainty of event, 740, 742.

due to uncertainty of remainderman, 740, 747-778.

CONTINGENT REMAINDER—

Continued.

effect of, interposed between freehold and inheritance to bar curtesy or dower, 236, 237, 273, 276, 277.

• effect upon, of forfeiture of preceding estate for breach of implied condition, 780, 781, 782.

of illegality of contingency, 793, 794.

of merger of preceding estate, 780, 781, 782.

inheritance in abeyance, 796.

interpolation of fee simple, between particular estate and ulterior remainder, 798.

interpolation of, less than fee simple, 797.

judgment, a lien on, 693, 805, 811.

liability of, for debts, 693, 805, 811.

limitations by way of,

See **LIMITATION**.

limited to certain person and on certain event, but without capacity to take effect, 745.

limited to person unascertained or not in being, 747.

limited upon an uncertain event, 742.

must arise by same instrument and at same time as preceding estate, 735.

must depend on event which may never happen, 742.

must not take effect in derogation of preceding estate, 734, 795.

nature of, 740.

no, to fail in Va. for want of particular estate, 782.

of freehold, preceded by term

[References to sections]

CONTINGENT REMAINDER—

Continued.

for years, void as a, 734, 745, 746.

but good as executory limitation, 734, 745.

of freehold, to be preceded by freehold, 734.

period within which, may vest, 789-792.

possibility of gap between preceding estate and, the usual criterion of a, 736, 745.

precedent estate subject to condition precedent that never happens, 799.

premature termination of preceding estate defeats, 734, 736, 790.

release of, by way of extinguishment, 1210.

rule against perpetuities applied to, 792.

See **RULE AGAINST PERPETUITIES**.

sale of, under decree of court, at instance of particular tenant, 804.

subject to attachment, 805, 811.

subject to condition precedent, 742, 743, 744.

subject to judgment lien, 693, 805, 811.

to heirs, issue, descendants, etc., 745, 747, 750, 751.

to heirs, issue, children, etc., of unborn person void, 791.

to heirs, etc., after freehold in ancestor,—the rule in *Shelley's Case*, 752-778.See **RULE IN SHELLEY'S CASE**.

to unbegotten bastard invalid, 793.

transfer of, 803, 804.

trustee to preserve, 781.

CONTINGENT USES, 1232, 1233.**CONTINUAL CLAIM,**

abolished in Virginia, 144, 1018.

as prolonging period of limitation, 1018.

nature of, 144, 1018.

CONTRACT,

executed,

See **CONVEYANCE; DEED**.

executory,

alteration of, 1191, 1192.

cancellation of, 1194.

in consideration of marriage, registry of, 1390, 1391, 1392.

to convey land,

See **CONTRACT TO CONVEY; CONVEYANCE; SPECIFIC PERFORMANCE; STATUTE OF FRAUDS**.

to devise land, 1284.

to execute power, equivalent to execution, when, 1338.

to mortgage, an equitable mortgage, 269, 614.

to lease land, 363, 369, 1200.

See **LEASE; CONTRACT TO CONVEY**.**CONTRACT TO CONVEY LAND,**See **CONVEYANCE; SPECIFIC PERFORMANCE; STATUTE OF FRAUDS**.

agent may make, 1289.

appreciation in value accrues to vendee, 20.

as security for purchase money, an equitable mortgage, 614.

chattel annexed to land passes under, 36.

consideration for, 1287, 1310-1313.

creates equitable title, 1284.

deterioration in value accrues to vendee, 20.

[References to sections]

CONTRACT TO CONVEY**LAND—Continued.**

devise of land subject to prior,
474.

discharge by parol of written,
1315.

dower in vendee's interest under,
284.

in vendor's interest under, 268.

See **DOWER**.

equitable conversion under, 20,
474.

See **EQUITABLE CONVERSION**.

fixture severed by, 36.

growing crops and trees sold
under, 1286.

interest of vendee under, be-
comes land by equitable con-
version, 20, 474.

judgment against vendor under,
a lien on land sold, when, 693.
need not be indexed in record
books to constitute notice,
1403.

oral, when good, 1100, 1101, 1290-
1300.

part performance of oral, 1292-
1297.

registry of, as to creditors and
purchasers, 1390, 1391, 1392,
1405.

required usually to be in writing,
1100, 1101, 1285-1300.

signature to written, 1289.

specific performance of,

See **SPECIFIC PERFORMANCE**.

wherein wife has not joined,
318.

trees sold under, 1286.

vendee under, by one in adverse
possession may take posses-
sion, 1030.

where land has been previously
devised, 474.

CONTRACT TO CONVEY**LAND—Continued.**

wife's joinder in husbands, as
bar to dower, 316.

writing not good as a deed may
be sustained in equity as a,
1236, 1288.

writing required for, under stat-
ute of Frauds, 1285, 1300.

See **STATUTE OF FRAUDS**.

unless prevented by fraud,
1291.

or contract partly per-
formed, 1292-1297.

See **PART PERFORMANCE**.

or defendant's answer con-
fesses the, 1298.

or in case of deposit of title
deeds as security for
money, 1299.

or in case of judicial sale,
1300.

CONTRIBUTION,

by land descended or devised
with dower to pay incum-
brances, 339.

to build division fences, 126.

to build party wall, 125.

CONVERSION,

See **EQUITABLE CONVERSION**.

CONVEYANCE,

by agent under power of attor-
ney, 1105.

See **AGENT; POWER OF ATTOR-
NEY**.

by alien, 1084.

by alien enemy, 1084.

by assignment,

See **ASSIGNMENT**.

by bargain and sale,

See **BARGAIN AND SALE**.

by confirmation, 1220, 1221.

[References to sections]

CONVEYANCE—Continued.

- by corporation, 1085.
- by covenant to stand seised,
See COVENANT TO STAND SEIZED.
- by deed,
See DEED.
- by deed indented, 1107.
- by deed poll, 1107.
- by defeasance, 525, 1197, 1204,
1228.
- by donee of power coupled with
an interest extinguishes power,
when, 1344.
See POWER.
- by drunken person, 1076.
- by exchange,
See EXCHANGE.
- by feoffment, 1107, 1198.
See FEOFFMENT.
- by fine, 308, 1079.
- by gift, 1199.
- by grant, 1201.
See GRANT.
- by joint tenant of estate of co-
tenant, 889.
- by lease, 1200.
See LEASE.
- by married woman,
at common law, 308, 1078, 1079.
in Virginia, 309-318, 1081, 1082.
to her husband, 331, 1080.
See MARRIED WOMAN.
- by one attainted of treason or
felony, 1083.
- by one co-parcener to another,
940.
- by one joint tenant to another,
888.
- by one tenant in common to an-
other, 926.
- by partition, 1203.
See PARTITION.
- by release, 1205-1211.
See RELEASE.

CONVEYANCE—Continued.

- by surrender, 1212-1219.
See SURRENDER.
- by tenant by entireties, 908, 910,
911.
- capacity of grantee in, 1086-
1097, 1106.
of grantor in, 1073-1085, 1106.
See CAPACITY.
- chattels annexed to land pass by,
of land, 36.
- common law, 1197-1228.
- condition clause in, 1113.
See CONDITION.
- deed of.
See DEED; STATUTE OF FRAUDS.
- deed not a, but mere evidence of
a, 1102.
- deed when necessary for a, 1099-
1101.
- derivative or secondary, 1204-
1228.
- effect of, of dominant tract to
convert quasi easements into
easements 104.
of servient tract, 107.
- fraudulent.
See FRAUDULENT CONVEYANCE.
- fructus naturales pass with, of
land, 40.
severed from land by, becomes
personalty, 42.
- grantee in.
See PURCHASER; ASSIGNEE;
COMPLETE PURCHASER.
- habendum clause in, 1110.
See HABENDUM; PREMISES.
- invalid, may create estate at will,
378, 390.
- nature of, 1070.
- of fixture apart from land severs,
36.
- of land carries growing crop, 43.
also growing trees, etc., 40.

[References to sections]

CONVEYANCE—Continued.

- of land devised revokes will, 1270.
- of land on which license to be exercised revokes license, 136.
- of minerals apart from surface of land, 51.
- of oil or gas, a grant of land, not of mere profit a prendre, 64.
- of servient tract to purchaser without notice extinguishes easement, 117.
- origin of, 1070.
- original or primary, 1197-1203.
- power of revocation in, 1327.
 - of sale carries power to make, 1327.
 - See **POWER**.
- premises clause in, 1109.
 - See **PREMISES**.
- purchaser must have received, to be a complete purchaser, 1409, 1410.
 - See **COMPLETE PURCHASER**.
- reddendum clause in, 1112.
 - rent or easement reserved in, 1112.
- registry of, 1390, 1391, 1392, 1405.
- subject matter of, 1071, 1072.
- tenendum clause in, 1111.
- to alien, 1089.
- to alien enemy, 1089.
- to corporation, 1090-1095.
 - See **CORPORATION**.
- to dead grantee, 1088.
- to infant, or insane person, 1086.
- to married woman, 1086.
- to one attainted of treason or felony, 1096.
- trustee to execute, as directed by cestui, 487.
- under duress, voidable, 1077.
 - See **DURESS**.

2 Min. Real Prop—43**CONVEYANCE**—Continued.

- under statutes, 1229-1237.
 - curative effect of, 1236, 1237.
- under statute of Uses, 1230-1234.
 - bargain and sale, 1231, 1232.
 - covenant to stand seised, 1233.
 - lease and release, 1234.
- under statute of Future Grants, 1235, 1236, 1237.
- under statute of Grants, 1235, 1236.
- validity of, governed by *lex situs* of land, 1070.
- writing intended as, sustained as contract to convey in equity, 1236.
- words of limitation in, 151, 152, 153, 160.
 - See **WORDS OF LIMITATION**.

CONVEYANCES,

- statute of.
 - See **STATUTE OF FRAUDS**.
- statute of fraudulent.
 - See **FRAUDULENT CONVEYANCES**;
FRAUD.

COPARCENER,

- accounting of one, to another for profits, 939.
- action by, or against, when joint, 936.
- adverse possession of one, against another, 937, 1033, 1039.
- assignment of dower to wife of, in undivided portion, 350.
- cannot be purchaser at tax sale, 1369.
 - See **TAX SALE**.
- compulsory partition, 942, 956-965.
- conveyance by one, to another, 940, 1208.
- curtesy in land held by wife as, 230, 231, 233, 941.

[References to sections]

COPARCENER—Continued.

deed for voluntary partition, 946.
 disability of one, does not prevent running of statute of limitations against another, 1022.
 dower in land held by husband as, 270, 941.
 entry by one, enures to all, 937.
 estate of, always an inheritance, 931.
 existence of interest of, as breach of covenant of seisin, 1123.
 heir succeeding to estate pur auter vie by special occupancy not a, 931.
 hotchpot applied to, 948-954.
 See **HOTCHPOT**.
 incidents of estate of, 935-942.
 liability of one, to another for profits, 939.
 for trespass, 938.
 for waste, 439, 441, 938.
 modes of partitioning land, 946.
 nature of, 930.
 partition between, 942, 946, 947, 1203.
 See **PARTITION**.
 possession of one, enures to all, 230, 231, 937.
 properties of estate of, 932-934.
 redemption by, of land sold for taxes, 1376.
 takes by descent, 930, 931.
 termination of estate of, 943-947.
 transfer by one, to stranger terminates estate of, 944.
 union of all shares in hands of one, terminates estate of, 945.
 unity of estate or interest, 933.
 unity of possession, 934.
 unity of title, 932.
 unity severed terminates estate of, 943, 944.

COPARCENER—Continued.

voluntary partition, 946, 947.
 implies a warranty, 947.
 with wife, possession of, is wife's possession, for purpose of curtesy, 230, 231.

CORODY,

definition of, 66.
 descends to heirs when mentioned, 17, 66.
 dower in, 289.
 fee conditional in, 178, 194.
 not converted into estate tail, 178, 194.
 is personal property, 66.
 not a "tenement," 66.
 not within statutes of mortmain, 66.

CORPORATION,

as grantee in deed, 1090-1095.
 at common law, 1090, 1091.
 in Virginia, 1095.
 statutes of mortmain, 1091-1094.
 as grantor in deed, 1085.
 condition restraining alienation annexed to grant to, 583.
 grant to, impeachable only by State, 1085, 1095.
 no delivery needed for deed of, 1140.
 "nullum tempus occurrit regi" applies to municipal, 1024.
 stockholder's interest in land of, personalty, 22.
 title to land of dissolved, 967.
 words of limitation in deed to, 157.

**CORPOREAL HEREDITA-
MENTS**,

See **LAND**.

[References to sections]

COSTS,

decree for, in foreclosure suit, 638.
decree for, in partition suit, 964.

COUNTY,

as purchaser at tax sale, 1372.
treasurer of.
See TREASURER; TAX; TAX SALE.

COUPLED WITH AN INTEREST,

agency, 1105.
See AGENT; POWER OF ATTORNEY.
license, 133, 134, 136, 137.
See LICENSE.
power, 1317, 1331, 1332, 1334, 1344.
See POWER.

COURSES AND DISTANCES,

See DESCRIPTION.
description of land by references to, 1151.
intent governs as between, 1151.
meanders of stream preferred to, 60.
meaning of, 1151, 1152.
measure of, 1151, 1152.
monuments preferred to, 1151.

COVENANT,

against incumbrances, 1126, 1130, 1131, 1132.
broken, if at all, as soon as made, 1131.
measure of damages upon, 1132.
not same as general warranty, 1130.
assignee to be mentioned, when, 421, 1118.
assignee's liability upon, in lease, 1227.

COVENANT—Continued.

broken, does not run with land, 423, 1120, 1131.
but may be expressly assigned, 1120.
creating an easement in equity, 1119, 1120.
creating a trust in equity, 1119.
destroyed by surrender of possession, 1219.
unless already broken, 1219.
does not run with land as against appointee under power, 422.
nor against sublessee, 422.
does not run with reversion, if reversioner comes in by title paramount, 424.
dower barred by wife's, when, 332.
effect upon, of disclaimer under deed, 1195.
effect of, in estopping grantor to set up after title, 1133.
express, of title, 1122-1133.
for benefit of others than parties, 1119.
for further assurances, 1127.
for re-entry for default, 418.
grant of easement in form of a, 100.
implied, 403, 414, 1121.
impossible of performance, 565.
in conjunctive and disjunctive, 565.
in deeds of fee simple, 1122-1133.
in leases, 413-418, 421-424.
liability of assignee of land upon, 1227.
liability of assignee of reversion upon, 1227.
liability of remote grantors upon, 1131.
measure of recovery upon, 403, 1132.

[References to sections]

COVENANT—Continued.

merger of estate may prevent running of, 424.
 not to assign without leave, 417.
 not running with land, 1118, 1119.
 of general warranty, 1128, 1130.
 of quiet enjoyment, 403, 1123.
 implied in lease, 403.
 of renewal in lease, 359.
 of right and power to convey, 1124, 1131.
 broken, if at all, when made, 1131.
 may be used where grantor has no seisin, 1124.
 of seisin, 1123.
 effect of recovery upon, as bar to dower, 295, 314.
 of special warranty, 1128, 1129.
 of title, 403, 414, 1121, 1122-1133.
 implied, 403, 1121.
 no, in quit-claim deeds, 1211.
 release of, by grantee after assignment, ineffectual, 1131.
 runs with land usually, 1131.
 except covenants broken, etc., 1131.
 transfer of after acquired title by estoppel arising from, 1133, 1350.
 See **ESTOPPEL**.
 of warranty, implied upon assignment of dower, 347.
 implied upon an exchange, 1202.
 implied upon a partition, 947.
 privity of estate necessary to running of, 422, 1118, 1119.
 real, 1114, 1115, 1116.
 See **WARRANTY**.
 relating to land not conveyed, 1119.
 rights of assignee of reversion under, 1227.

COVENANT—Continued.

running with land, 421-423, 1120-1133.
 application of power of appointment in case of, 1329.
 running with reversion, 424.
 running of benefits of, 1120.
 running of burdens of, 1120.
 to execute power, equivalent to execution when, 1338.
 to pay rent, 412, 415.
 to repair, 416.
 to stand seised for love and affection.
 appointee under power in, not within consideration, 1329.
 consideration to support, 450, 451, 455, 456.
 conveyance by, under statute of Uses, 1233, 1236, 1237, 451, 456, 466.
 transfer by donee of power in gross by, does not extinguish power, 1344.
 See **POWER**.
 use created by, 450, 451, 455, 456.

CREDITOR,

as attesting witness to will, 1257, 1259.
 attachment lien, has no priority over defective first mortgage, 656.
 bill of, to subject land to judgments, 699.
 cannot subject more than debtor's interest, 479, 656, 693, 1391, 1404.
 condition that land shall not be subjected to debts, 588, 589.
 definition of, under statutes of Fraudulent Conveyances and of Registry, 1171, 1404.

[References to sections]

CREDITOR—Continued.

- dower before assignment not subject to debts, 337.
- dower in estate void as to, 266, 295, 314.
- equity of redemption subjected by, 602.
- executory limitation subjected by, 865.
- fee simple subjected by, 165.
- fee tail not subject to, 186, 191.
- husband of, as attesting witness to will, 1257, 1259.
- judgment lien, has no priority over defective first mortgage, 656.
- See PRIORITY.
- judgment lien, to subject land, 699.
- may attack deed for fraud.
- See FRAUDULENT CONVEYANCE.
- for fraud against others than himself, 1178.
- mortgage implied from deposit of title deeds as against, 615, 616.
- mortgagee a personal, of mortgagor, 598, 625, 629.
- of cestui que trust may subject trust, 484, 487.
- of deceased landowner may subject it, 165, 969.
- of donee of general power to subject land to donee's debts, when, 1319.
- of donee of power, made appointee under defective exercise thereof, aided in equity, 1338.
- of grantor may sue clerk for not recording writing duly admitted to record, 1393.
- of husband, when superior to wife's dower, 339, 340.

CREDITOR—Continued.

- of trustee may subject trust estate when, 479, 498.
- oral contract to convey land void as to, 1297.
- power of attorney to, authorizing sale, equivalent to equitable mortgage, 614.
- priority of one, over another, 1416.
- See PRIORITY.
- redemption from tax sale by, 1376.
- remainder to be subjected by, 805.
- secured by attachment lien, not a purchaser, 595.
- See ATTACHMENT LIEN.
- secured by deed of trust, a purchaser, 595.
- See MORTGAGE; DEED OF TRUST.
- secured by judgment lien, not a purchaser, 595.
- See JUDGMENT LIEN.
- secured by mechanic's lien, not a purchaser, 595.
- See MECHANIC'S LIEN.
- secured by mortgage, a purchaser, 595.
- See MORTGAGE; DEED OF TRUST.
- secured by vendor's lien, not a purchaser, 595, 682.
- See VENDOR'S LIEN.
- tacking of debt to mortgage, 622-624.
- See TACKING.
- transactions not to be recorded as against, 700, 1390, 1405.
- transactions to be recorded as against, 700, 1390, 1405.
- who is a, under statute of Fraudulent Conveyances, 1171, 1404.
- See FRAUDULENT CONVEYANCES.

[References to sections]

CREDITOR—Continued.

who is a, under statute of Registry, 1404.

See **REGISTRY**.

wife of, as attesting witness to will, 1257, 1259.

wife's release of dower does not operate as against a, who sets aside husband's deed, 266, 295, 314.

writing void as to, for vagueness, though recorded, 1402.

CROPS,

curtesy in growing, 46, 49, 293.

dower in growing, 293.

grantee and grantor in deed under power to lease, tenants in common of, 1200.

growing on land sold under decree of court, 636.

lien on, registry of, 1390, 1392, 1405.

sale of growing, 1286.

when personality and when realty, 43-50.

See **EMBLEMENTS**; **FRUCTUS INDUSTRIALES**.

CURATIVE STATUTE,

curing defective acknowledgments, 312, 1398.

curing defective powers of attorney by married woman, 312.

effect of tax-deed under, 1386.

See **TAX-DEED**.

statutes of Uses, Grants and Future Grants as, 1230, 1236, 1237.

CURTESY,

See **DOWER**.

antenuptial conveyance in fraud of, 297, 1166.

arises by act of law, 966.

barrable by sundry devices, 298-302.

CURTESY—Continued.

barred by husband's joinder in wife's conveyance of statutory separate estate, 1082.

commuted value of, 290.

death of wife essential to, 245.

definition of, 223.

divorce, bars, 227.

distinguished from dower, 253, 260.

dos de dote applied to, 236.

duties of tenant by, in general.

See **LIFE ESTATE**.

husband's desertion bars, 228.

husband's interest before birth of issue, 243.

in conditional limitation, 250.

in coparcenary estate, 941.

in equitable estates, 239, 240.

in equitable separate estate, 234, 240, 244.

in equity of redemption, 602.

in executory limitation, 250, 836.

in fee qualified, 248.

in fee simple absolute, wife dying without heirs, 247.

in fee simple upon condition subsequent, 249.

in fee tail, 191, 238.

in fee tail, wife dying without issue, 247.

in joint estate of inheritance, 233.

in land disposed of by wife before birth of issue, 234, 242.

in land acquired by wife after birth and death of issue, 234, 242.

in land whereof wife is unlawfully seised, 235.

in land wherefrom wife is evicted, 235.

in land whereof wife is seised at her death, 234.

in partnership land, 21.

[References to sections]

CURTESY—Continued.

in property destroyed, 251.
 in remainder, 236, 836.
 in reversion, 236.
 in right of entry or action, 229, 232.
 in statutory separate estate, 234, 241.
 in surplus, after satisfying lien, 239.
 in uses, 448.
 initiate after birth of issue, 243, 244.
 a vested interest, 243.
 adverse possession against, 243, 244.
 becomes consummate after wife's death, 243.
 in equitable separate estate, 244.
 is it abolished in Virginia, 244.
 issue born alive during coverture essential to, 242.
 issue must take as heirs, not as purchasers, 238.
 legitimization of bastard, effect of, 242.
 marriage necessary for, 226.
 merger of possession by inheritance for, 237.
 nature of wife's inheritance for, 236, 237.
 no, in life estate, 236.
 no intervening freehold allowed between possession and inheritance, 236, 237.
 origin of, 224.
 possession by cotenant of wife sufficient for, 230, 231.
 prolongation of wife's estate, 246.
 requisites for, 225.
 rights of tenant by, in general.
 See **LIFE-ESTATE**.
 seisin for.

CURTESY—Continued.

at any time during coverture, 229, 234.
 in fact usually required for, 230.
 in law when sufficient for, 230, 231.
 sole, effect of, 233.
 tenant by, entitled to emblements, 46.
 See **EMBLEMENTS; CROPS**.
 liable for waste, 437-439.
 See **WASTE**.
 wife's estate heritable by issue as heirs of wife, 238.

CURTILAGE, MEANING OF, 17.**CUSTOM,**

cannot be shown to vary a written lease, 47.
 cannot exist in Virginia as local law, 47.
 of away going crops, 47.
 rights exercised under, distinguished from prescriptive title, 1056.

DAM, OBSTRUCTING FLOW OF STREAM, 57.**DAMAGES,**

See **COMPENSATION**.
 for breach of contract of sale for land, 1132.
 for breach of covenant of title, 403, 414, 1132.
 for breach of covenant real, or warranty, 1114, 1115.
 for eviction of tenant, 403, 414.
 for specific performance, act must be incapable of compensation in, 1296.
 for violation of easement, 121, 122, 123, 125, 126, 127, 128, 1065, 1066.

[References to sections]

DAMAGES—Continued.

for waste, 440.

for withholding dower, 354.

DATE OF DEED,acknowledgment as evidence of,
1134.

See ACKNOWLEDGMENT.

false, 1134.

fixed by date of delivery, 1134,
1140.

See DELIVERY

impossible, 1134

DE DONIS CONDITIONALIBUS, STATUTE OF, 176, 177.

See FEE-TAIL.

DEAF AND DUMB PERSON, WILL OF, 1242.**DEATH,**

civil, 200, 245, 1078.

See CIVIL DEATH.

of husband essential to dower,
279.of licensor revokes license when,
136, 137.

of principal revokes power of attorney when, 1105.

of wife essential to curtesy, 245.

presumption of, arising from absence, 279.

DEBTS,

See CREDITOR; LIEN.

DECEDENT, DEBTS OF, CHARGEABLE ON LAND OF, 165.

See DESCENT; HEIRS.

DECLARATIONS AS EVIDENCE,

See PAROL; EVIDENCE.

of intent to deliver deed, 1141.

DECLARATIONS AS EVIDENCE—Continued.of intent to make advancement,
952, 954.

of intent to republish will, 1275.

of intent to revoke advancement,
954.

See ADVANCEMENT; HOTCHPOT.

of intent to revoke will, 1264,
1266, 1269.

See WILL.

DECREE OF COURT,

lien of, same as lien of judgment, 692.

See JUDGMENT LIEN.

partition by, vests title without deed, 1203.

See PARTITION.

sale under.

See JUDICIAL SALE.

DEDICATION,

abandonment of property arising by, 1355.

acceptance of, by public authorities, necessary to complete,
1355.

binds authorities to use land as designated, 1355.

depends on intention, 1354.

easements created by, 1353.

implied, 1355.

interests created by, 1353.

nature of, 1353.

no special form or ceremony for,
1354.not within statute of Frauds,
1354.

See STATUTE OF FRAUDS.

of land by husband's sole act bars dower, 295.

offer of, revocable, 1355.

presumption of, 1355.

[References to sections]

DEDICATION—Continued.

public authorities not bound by
until acceptance of, 1355.
reversion to dedicator, 1355.
subject to conditions or restric-
tions, 1353.

DEED,

acceptance of, 1104, 1195.
acknowledgment of, for registry.
See **ACKNOWLEDGMENT**.
alteration in, 1190-1192.
ancient, proves itself, 1145.
appurtenances pass with land
under a, 1155.
assignment requires, when, 1225.
See **ASSIGNMENT**.
assignment of dower requires no,
347.
See **ASSIGNMENT OF DOWER**;
DOWER.
attainder of treason or felony af-
fects, how, 1083, 1096.
attesting witnesses to, 1145.
See **ATTESTING WITNESS**.
authentication of, for registry by
witnesses, 1145.
See **REGISTRY**.
bargain and sale requires, when,
1232.
See **BARGAIN AND SALE**.
book, registry in.
See **REGISTRY**; **RECORDATION**.
by agent under power of attor-
ney, 1105.
See **AGENT**; **POWER OF ATTORNEY**.
by alien, 1084.
by alien enemy, 1084.
by corporation, 1085.
See **CORPORATION**.
by drunken person, 1076.
by infant, 1074.
by insane person, 1073.

DEED—Continued.

by married woman, 308-318, 1078-
1082, 1109.
See **MARRIED WOMAN**.
cancellation of, 1194.
capacity of parties to, 1073-1085,
1086-1097, 1106.
See **CAPACITY**.
cemetery lot may pass without,
130.
commissioner to execute, 500,
965.
conclusion of, 1134.
condition clause in, 1113.
See **CONDITION**.
confirmation requires, 1223.
See **CONFIRMATION**.
consideration for, 1156-1158.
See **CONSIDERATION**.
contingent remainder passes by,
803.
See **CONTINGENT REMAINDER**;
REMAINDER.
covenant to stand seised re-
quires, 1232.
See **COVENANT TO STAND SEISED**.
date of, 1134, 1140.
dedication requires no, 1354.
See **DEDICATION**.
delivery of, 1140-1144.
See **DELIVERY**.
acknowledgment as evidence
of, 1142.
conditional, 1144.
declarations as evidence of,
1141.
depends upon intention, 1141.
effect of, 1143.
fixes date of deed, 1140.
in escrow, 1144.
in grantee's absence, 1141.
mode of making, 1141.
no, needed for deed by corpo-
ration, 1140.

[References to sections]

DEED—Continued.

proof of, 1141, 1142.
 registry as evidence of, 1142.
 second, is void generally, 1143.
 signatures of attesting witnesses as evidence of, 1142.
 subsequent assent of grantee relates back to date of, 1141.
 to grantee's agent, 1141.
 descriptions in.
 See **DESCRIPTION**.
 ambiguous, construed against grantor, 1147.
 "false demonstratio," etc., 1147.
 modes of describing land in, 1148-1154.
 by government survey, 1149.
 by reference to plat or map, 1150.
 by monuments, courses and distances, 1151.
 by reference to streets and numbers, 1152.
 by reference to prior conveyance, 1153.
 by reference to quantity of land, 1154.
 vague, avoid, 1147.
 disagreement to, of persons whose assent is necessary, 1196.
 infant, 1196.
 lunatic, 1196.
 married woman, 1196.
 person under duress, 1196.
 disclaimer of title by grantee under, 1195.
 by devisee must be by, 1248.
 See **DISCLAIMER**.
 duress avoids a, 1077.
 See **DURESS**.
 easement created by, 100.
 See **EASEMENT**.

DEED—Continued.

erasure in, 1190-1192.
 estoppel from covenants in, passes after acquired title, 1350.
 estoppel of tenant to deny landlord's title independent of, 402.
 See **ESTOPPEL**.
 exchange requires, when, 1202.
 See **EXCHANGE**.
 executed outside Virginia, genuineness of for all purposes established by acknowledgment, 1400.
 fee tail alienable by, 189, 190.
 forms of, 1107.
 fraud in execution of, 1161.
 fraud in consideration for, 1160-1184.
 See **FRAUDULENT CONVEYANCE**; **FRAUD**.
 general nature of, 1102.
 grant requires, 1201.
 same under statute of Grants, etc., 1235.
 grantee in, described, 1109.
 grantor in, described, 1109.
 See **DESCRIPTION**.
 habendum clause in, 1110.
 See **HABENDUM**; **PREMISES**.
 indented, 1103, 1104.
 form of, 1107.
 index of, in deed book not required for registry, 1403.
 joint tenants convey to each other by release, 888.
 lease requires when, 362, 1099, 1101, 1200.
 See **STATUTE OF FRAUDS**.
 license created without, 134.
 See **LICENSE**.
 livery of seisin in, 144.
 mistake in execution of, 1135.
 See **MISTAKE**.

[References to sections]

DEED—Continued.

mortgage implied from deposit of title, 615, 616.

See MORTGAGE.

parol evidence to show a, absolute on its face to be a mortgage, 601.

See EVIDENCE; PAROL.

partition between coparceners requires, when, 946.

partition between joint tenants requires, 901, 902, 1203.

partition between tenants in common requires, 926.

partition under decree of court requires no, 963, 965, 1203.

See PARTITION.

poll, 1103, 1104.

form of, 1107.

power created by, upheld under statute of Future Grants, 1325.

power exercised by, containing general expressions, when, 1334.

power exercised by, not a sufficient exercise of a power by will, 1333, 1338.

power of sale carries power to make, 1321.

power to be exercised by, can be exercised by will, when, 1333, 1338.

See POWER.

premises in, 1109, 1110.

See PREMISES; HABENDUM.

property transferrable by, 1071, 1072.

purchaser under, becomes such at date of, not at time of registry of, 704.

purchaser under registry laws must have received, before notice of equity, 1409, 1410.

See COMPLETE PURCHASER; PURCHASER.

DEED—Continued.

quitclaim, 1211.

reading of, necessary, 1135.

reddendum clause in, 1112.

registry of, as to creditors and purchasers, 1390, 1391, 1392, 1405.

See REGISTRY.

action against clerk for non, 1393.

by creditor or purchaser, 1393.

by grantee, 1393.

of new, in place of lost, 1391.

release of easement must be by, 112.

release of trust, trustee's wife need not unite in, 268.

release requires, when, 646, 1209, 1211.

See RELEASE.

seal attached to, broken off or defaced, 1193.

seal necessary to, 1136, 1137.

See SEAL.

seisin in, 141.

signature to, essential, 1137.

statute of Frauds requires, when, 378, 390, 1100, 1101.

See STATUTE OF FRAUDS.

substituted for livery of seisin under statutes of Grants and Future Grants, 1101.

surrender requires, when, 1216, 1217.

tacking of possessions by one holding under, from adverse occupant, 1030.

See TACKING.

tenendum clause in, 1111.

to alien, 1089.

to alien enemy, 1089.

to corporation, 1090-1095.

See CORPORATION.

to dead grantee, 1088.

[References to sections]

DEED—Continued.

- to infant, 1086.
- to insane person, 1086.
- to married woman, 1086.
- See **MARRIED WOMAN**.
- to one attainted of treason or felony, 1096.
- to purchaser at tax sale, 1381-1387.
- See **TAX-DEED**; **TAX SALE**.
- use assignable by, 448.
- when required for conveyance, 1099-1101.
- will converted from, 1251.
- words of limitation in a, 151, 152, 153, 160.
- See **WORDS OF LIMITATION**.
- writing good as a, may pass land, 1236.
- if not good as a, may be sustained as a contract to convey, 1236.
- written on paper or parchment, 1108.

DEED OF TRUST TO SECURE DEBT,

- See **MORTGAGE**; **TRUST**; **TRUSTEE**.
- analogous to mortgage in many respects, 595, 663.
- assumption of, by purchaser.
- excludes it from covenant against incumbrances, 1126.
- makes purchaser principal debtor, 647.
- revives dower of grantor's widow, when, 287, 340.
- condition of punctual payment or whole debt to fall due, 592.
- converted into mortgage, if trustee is creditor, 614, 676.
- covenant against incumbrances includes, 1126.

DEED OF TRUST TO SECURE DEBT—Continued.

- creditor secured by, a purchaser, 595, 1171, 1172, 1404, 1406.
- See **CREDITOR**.
- curtesy in surplus after satisfying, 239.
- death of debtor before execution of trust, 677.
- distinguished from liens in general, 679.
- distinguished from mortgage, 610, 664.
- distribution of proceeds of sale under, 668.
- dower in land subject to, 269, 339, 340.
- dower in surplus after satisfying, 285-287.
- dower liable to pay off, 355.
- dowress' duty to pay, 217, 355, 651.
- index of, not necessary to due registry, 1403.
- intervention of equity in case of, 671-677, 506.
- joinder of wife in husband's, 315.
- life tenant's duty to pay interest and principal of, 217, 651, 355.
- May v. Joynes doctrine still applies to, 162.
- nature of, 664.
- priority of, 653-660, 1417, 1418.
- See **PRIORITY**.
- registry of, 1390, 1391, 1392, 1405.
- release of, 662.
- sale by trustee under, 506-508, 666-669.
- substitution of trustee under, 674, 675.
- sum to be raised under, doubtful, 673.
- title to property under, clouded, 672.

[References to sections]

DEED OF TRUST TO SECURE**DEBT**—Continued.

trustee's account of sales, 508, 669.

trustee's compensation, 507, 670.

trustee's duties under, 665-669.

trustee's forbearance, to sell under, 667, 671-677.

trustee's name left blank in, a mortgage, 614.

trustee's wife need not unite in release of, 602.

DEFEASANCE,

a derivative or secondary conveyance, 1197, 1204.

distinguished from a condition, 1228.

disused in modern times, 1228.

mortgages formerly created by, 1228.

nature of, 525, 1228.

DELINQUENT,

land.

See **TAX-SALE; TAX.**

land book, 1373.

tax.

See **TAX; TAX-SALE.**

tax-book, 1362.

DELIVERY,

bond, lien of, 709.

conditional, or escrow, 1144.

necessary to a deed, 1102.

not necessary to contract to convey, 1288.

deed void for want of, sustained as contract, 1288.

not necessary to deed in exercise of a power, when, 1333.

of deed, 1140-1144.

See **DEED.**

of lease, 367.

purchase under registry laws dates from, 1407.

DELIVERY—Continued.

of possession, as act of part performance, 1294, 1295.

DEODANDS,

franchise of, cannot arise by prescription, 1057.

DEPOSIT OF TITLE DEEDS,

equitable mortgage by, 615, 616.

takes contract to convey land out of statute of Frauds, 1299.

See **STATUTE OF FRAUDS.****DERELICTION, TITLE TO LAND BY,** 1010, 1012, 1013.**DESCENDANT, AS WORD OF LIMITATION,** 154.See **WORDS OF LIMITATION.****DESCENDIBLE FREEHOLD,** 170.**DESCENT,**See **HEIRS; COPARCENER.**

adopted children take by, 999.

agreement of ancestor with heir to evade statute of, void, 1315.
alienage affects, how, 967, 1001, 1002.

apportionment of rent or common affected by, of servient land upon owner of former, 74, 90.

attainder of treason, etc., affects, how, 967.

canons of, at common law, 981-988.

covenant binds heirs to extent of assets descended, 1115.

bastards legitimated take by, 998.

bastards take by, on part of mother, 997.

collateral heirs take by, at common law, 986-988.

[References to sections]

DESCENT—Continued.

- if not of half blood, 967, 987.
- if of blood of first purchaser, 986.
- male stock preferred to female, 988.
- collateral heirs of half blood take half shares in Virginia, 996.
- collateral relationship, 974-976.
 - canon law rule to measure degrees of, 974.
 - civil law rule, 975.
 - common law rule, 976.
- degrees of relationship, 973-976.
 - from infant, 994.
- heirs apparent and presumptive, 980.
- heirs' liability for ancestor's debts, 969.
- heirs take by, per capita, when, 995.
- heirs take by, per stirpes, when, 985, 995.
- heirs taking by.
 - See **HEIRS**; **COPARCENER**.
- heirs taking as special occupants do not take by, 202.
- hotchpot applied to, 948-954, 1000.
 - See **HOTCHPOT**.
- kindred, lineal and collateral, 972-976.
- lineal ancestor as heir by, 982, 992.
- lineal descendants take by, 982-985, 992.
- lineal kindred, 973.
- male heirs preferred to female at common law, 983.
 - not so in Virginia, 992.
- order of succession by, 992, 994.
- possessio fratris, at common law, 979.
- posthumous heirs take by, when, 993.

DESCENT—Continued.

- primary canons of, 981-986.
- primogeniture, at common law, 984.
- secondary canons of, 981, 987, 988.
- shares of heirs by, 995-999.
- statute of, 989-1002.
- title by, arises by act of law, 966.
- title by, distinguished from title by purchase, 964, 968, 969.
- title by, in Virginia, 989-1002.
- tolls entry, 145, 1019.
 - doctrine abolished in Virginia, 145, 1019.

DESCRIPTION,

- ambiguity of, construed against grantor, 1147.
- appointment under power by words of general, 1334.
- appurtenances pass under, of land, 1155.
- "falsa demonstratio non nocet," etc., 1147.
- mistake in, 1187, 1307, 1308, 1309.
- modes of, of land in deed, 1148-1154.
 - by Government survey, 1149.
 - by metes and bounds, 1151.
 - by monuments, courses and distances, 1151.
 - by number of acres or quantity, 1154.
 - by reference to plat or map, 1150.
 - by reference to prior conveyance, 1153.
 - by reference to streets and numbers, 1152.
- of devisee in will, 1246.
- of grantee in deed, 862, 1087, 1109.
- of grantor in deed, 1109.

[References to sections]

DESCRIPTION—Continued.

- of lake or pond, conveyed by deed, 19.
- of land bounded by public or private waters, 60.
- of land in tax-deed, 1374, 1382.
- of land in will, 1249.
- oral compromise of boundary, in case of doubtful, 1036.
- trust void for vagueness of, 521, 522, 1246.
- vague and indefinite, avoids deed, 1147.
- may avoid writing as to third persons, though duly registered, 1147, 1402.

DESERTION,

- effect of husband's, upon curtesy, 228.
- effect of wife's, upon dower, 228, 306.
- tenant's, of leased premises forfeits them, 526.

DEVISE,

- See **WILL OF LAND.**
- contract to, 1284.
- lapse of, 1278-1280.
- See **LAPSED DEVISE.**
- of dominant and servient tracts converts quasi-easement into easement, 104, 107.
- real fixtures pass under, 36.
- use created by, 451, 456.

DEVISEE,

- See **WILL OF LAND.**
- as attesting witness to will, 1256, 1259.
- bound by testator's prior promise to devise, 1284.
- capacity to be a, 1246, 1247.
- catching bargain with, 1165.

DEVISEE—Continued.

- contribution of, with widow's dower to pay incumbrance, 339.
- damages against, for with holding dower, 354.
- debts of testator follow lands to, 165.
- disclaimer of title by, must be by deed, 1248.
- distinguished from legatee, 1239.
- dower assigned by, 346.
- dower in land of, before land sold is subjected, 349.
- dower of widow of, as against testator's widow, 274, 275.
- exoneration of dower out of lands of, 339.
- husband of, as attesting witness to will, 1256, 1259.
- listing land for taxation in name of, 1359.
- purchaser from, takes subject to testator's debts, when, 165.
- release by lessor's, 1209.
- uncertainty of, avoids will, 1246.
- valuation of land of, for dower, 342.
- wife of, as attesting witness to will, 1256, 1259.

DIPLOMATIC AGENT, ACKNOWLEDGMENT BEFORE, 1397.**DISABILITIES,**

- allowance for, in case of adverse possession, 1022, 1023.
- allowance for, in case of prescription, 1059.
- allowance for, in case of redemption from tax sale, 1378.
- of infant, 1022, 1074, 1378.
- of insane person, 1022, 1073, 1378.

[References to sections]

DISABILITIES—Continued.

of married woman, 308, 1078-1082.

See **MARRIED WOMAN**.

of person attainted, 1083, 1096.

of person imprisoned, 1378.

DISCHARGE,

of deed of trust, 662.

of liens, 662, 683, 686, 698, 708, 727, 728.

of mortgage, 662.

of written contract by parol, 1315.

DISCLAIMER,

of tenure of landlord by tenant, 212, 526.

of title.

by devisee must be by deed, 1248.

by grantee in deed, 1193.

by trustee, 516.

DISJUNCTIVE CONDITION,

547, 565.

See **CONDITION**.

DISSEISIN,

See **ADVERSE POSSESSION**; **STATUTE OF LIMITATIONS**.

curtesy, where wife is guilty of, 235.

dower assigned by one guilty of, 346.

dower how affected by husband's, during coverture, 337.

dower in estate of one guilty of, 266.

effect of, in general, 145.

emblems do not pass to one guilty of, 44.

nature of, 145.

of tenant by curtesy initiate, 243.

DISSEISEN—Continued.

release by disseisee to disseisor, reserving return not good as a rent, 84.

release by disseisee to disseisor, 1207.

to disseisor's life tenant, 1207.

warranty commencing by, 1114.

See **WARRANTY**.

DISTANCES AND COURSES,

See **DESCRIPTION**.

intent governs as between, 1151.

land described by reference to moments and, 1151.

meaning of "course," 1151.

measure of "distance," 1151, 1152.

monuments preferred to, 1151.

DISTRESS,

See **RENT**.

for rent charge, 86, 87.

for rent granted, when, 86, 87.

for rent of furnished house, 82.

for rent of incorporeal hereditament, 82.

for rent of remainder or reversion, 82.

for rent seck, 86, 87.

for rent service, 86.

DIVISION FENCE, 124, 126.

See **FENCE**.

DIVORCE,

after, wife may convey as feme sale, 1078.

curtesy barred by, when, 227.

curtesy how affected by husband's desertion without, 228.

dower barred by, when, 227, 264, 305.

tenancy by entireties terminated by, 910.

[References to sections]

DOCKETING OF JUDGMENTS, 700, 701.See JUDGMENT LIEN; REGISTRY;
RECORDATION.**DOMESTIC FIXTURES**, 34.

See FIXTURES.

DOMINANT TRACT,See COMMON; EASEMENT;
PROFIT A PRENDRE.**DOWER**,

action to recover, 351, 354.
 ad ostium ecclesiae, 255.
 alienage of husband or wife prevents, when, 296.
 alienee's widow's, as against grantor's widow's, 274, 275.
 all of husband's lands given as, by custom of free bench, 6.
 antenuptial agreement to relinquish as bar to, 330.
 antenuptial conveyance by husband as preventing, 297.
 antenuptial conveyance in fraud of, 297, 1166.
 antenuptial debts of husband when prior to, 339, 355.
 arises by act of law, 197, 966.
 assignable only out of dowerable lands, 349.
 assignment of, 341-355.
 See ASSIGNMENT OF DOWER.
 acceptance of, essential, 346.
 after, widows rights and duties, 355.
 before, a mere right of action, but no right of entry, 335.
 before, conveyance of, 337.
 before, release of, 337.
 before, statute of limitations does not run against widow, 337.

2 Min. Real Prop—44**DOWER—Continued.**

before, subject to debts, 337.
 before, widow's quarantine, 338.
 before, widow's rights and duties, 336, 337, 338.
 by metes and bounds, 350.
 by parol, 347.
 by whom, 346.
 compulsory, 351-354.
 conditional, 348.
 gross sum in lieu of, 350.
 how set apart upon, 350.
 in land conveyed in successive parcels, 349.
 in undivided shares, 270, 350.
 instrument of, 347.
 judgment for, equivalent to assignment of, 275.
 registry of, 1390, 1392.
 relates back to husband's death, 274, 275, 355.
 rent granted in lieu of, 348, 350.
 to widow or her assignee, 345.
 valuation of land for, as against heir or devisee, 342.
 valuation for, as against alienee, 343, 344.
 warranty accompanies, 347.
 at common law, 259.
 barred by acceptance of collateral satisfaction, 332, 349.
 by acceptance of estate in dowerable lands inconsistent with, 332.
 by adultery and elopement of wife, 306.
 by agreement of wife to relinquish, 330, 331.
 by condemnation proceedings, 295, 304.
 by covenants of wife, when, 332.

[References to sections]

DOWER—Continued.

- by dedication of land to public use, 295.
- by divorce, 305.
- by elopement and adultery of wife, 306.
- by estoppel, 332.
- by eviction under title paramount, 304.
- by fraud of wife, 332.
- by joinder in husband's deed, 307-318.
See **JOINDER**.
- by jointure, 319-328.
See **JOINTURE**.
- by power of appointment exercised, 301, 1329.
- by recovery by title paramount, 304.
- by sundry devices, 298-302.
- bill in equity to recover, 352, 354.
- by custom of particular places, 258.
- commuted value of, 290, 333.
- consummate upon husband's death, 334, 335.
- contingent right of, 294, 295.
when wife's statutory separate estate, 1082.
- contract to convey, 317, 318.
specific performance of, 318.
- conveyance in fraud of, 297.
- conveyance of infant wife's, 312.
- conveyance of insane wife's, 312, 316.
- conveyance of wife's, 309, 310, 311, 312, 316, 337.
- covenant against incumbrances covers, 1126.
- covenant of, seisin covers, when, 295, 1123.
- damages in suit for, 354.
- de la plus belle, 257.

DOWER—Continued.

- death of husband essential to, 279.
- definition of, 260, 261.
- design of, 262.
- devisee's widow's, as against testator's widow's, 274, 275.
- distinguished from curtesy, 253, 260.
- distress for rent granted in lieu of, 87.
- "dos de dote peti non debet," 274, 275.
applied to curtesy, 236.
- "due process of law," applicable to contingent, 295.
- duties of tenant in, in general, 337, 338, 355.
See **LIFE ESTATE**.
- election of widow to take, in rent or in land, 289.
to take, in tracts exchanged, 292.
to take dower, or jointure, 322, 325, 326.
See **JOINTURE**.
- emblements for tenant in, 46.
- entry by tenant in, for breach of condition, 355.
- ex assensu patris, 256.
- freehold interposed between seisin and inheritance, 276, 277, 302.
- grantee's widows, as against grantor's widow's, 274, 275.
- heir's widow's, as against ancestor's widow's, 274, 275.
- in annuities, 289.
- in conditional limitation, 250, 280, 836.
- in constructive trust, 268.
- in coparcenary estates, 941.
- in corodies, 289.
- in crops, 293.

[References to sections]

DOWER—Continued.

- in equitable conversion, 283.
- in equitable estates, 281-287, 299, 300.
- in equity of redemption, 285-287, 602.
- in estate void as to creditors, 266.
- in exchanged lands, 292.
- in executory limitation, 250, 280, 836.
- in fee qualified, 248, 280.
- in fee simple, after death of husband without heirs, 247, 280.
- in fee tail, 191, 247, 280.
- in fee upon condition subsequent, 249, 280.
- in fishery, 289.
- in franchise, 289, 350.
- in incorporeal property, 289, 350.
- in improvements, 342, 343, 344.
- in inheritance of husband, 272, 273.
- in joint estates, 270, 299.
- in land condemned for public use, 295.
- in land contracted to be sold, by husband, 268.
- in land contracted to be sold to husband, 284.
- in land conveyed in successive parcels, 349.
- in land dedicated to public use, 295, 303.
- in land recovered by judgment against husband, 266.
- in land sold under decree of partition, 270.
- in life estate, 273.
- in mines, 290, 350.
- in partnership lands, 21, 271.
- in quarry, 290, 350.
- in remainder, 273, 836.

DOWER—Continued.

- in rents, 289, 355.
- in reversion, 273, 274, 275, 355.
- in rights of entry or action, 267.
- in surplus after payment of lien, 285-287, 355.
- in trusts, 282.
- in uses, 448.
- in wild land, 291.
- inchoate right of, 294, 295.
- issue not essential to, 278.
- issue taking as purchasers, not as heirs, 278.
- joinder of wife to bar, 307-318.
See **JOINDER**.
- releases, but passes nothing, 295.
- jointure as bar to, 319-328.
See **JOINTURE**.
- judgment for, equivalent to assignment of, 275.
- legislature's right to abolish, during coverture, 295.
- marriage essential to, 226, 227, 264.
- measure of damages in suit for, 354.
- mortgagee's wife not entitled to, 268.
- not a vested estate during coverture, 295.
- origin of, 262.
- postnuptial agreement of wife to relinquish, 331.
- postnuptial debts of husband when prior to, 340, 355.
- power of appointment used to prevent, 301, 1329.
- priority of, over husband's debts, 269, 339, 340, 355.
- priority of, over other liens, 269.
See **PRIORITY**.
- priority of vendee's widow's, over

[References to sections]

DOWER—Continued.

vendor, as to unpaid purchase money, 284.
 prolongation of husband's estate, 246, 260, 280.
 purchaser's widow's as against grantor's widow's, 274, 275.
 quarantine, 338.
 recovery of, by action or suit, 352.
 re-entry by tenant in, for breach of condition, 355.
 release of, by wife's joinder in deed, 307-318.
 See **JOINDER**.
 release of, operates to extinguish, but passes nothing, 275, 295, 1210.
 only operates in favor of grantee and his privies, 275, 295.
 to person not tenant of freehold void, 331.
 relinquishment of, a valuable consideration to support post-nuptial settlement, 1182.
 rent in lieu of, 332.
 requisites of, 263.
 seisin of husband for, 265, 266, 268, 269, 276.
 beneficial, 268.
 in fact, 265.
 in law, 265.
 of inheritance, 276, 277, 302.
 transitory, 269.
 unlawful, 266.
 statutory separate estate when, 295, 310.
 surrender of, before assignment of, 1213.
 tacking of possession by tenant in, to husband's adverse possession, 1029.
 trustee's wife not entitled to, 268.

DOWER—Continued.

valuation of land for, 342-344.
 valuation of, 290, 333.
 waste by tenant in, 437-439.

DRAINAGE,

easement of, created from quasi easement, 104, 107.
 extinguished, 114.
 See **EASEMENT**.
 of surface water, 99, 128.

DRIP, EASEMENT OF, 129.

See **EASEMENT**.

DRUNKENNESS,

effect of, upon conveyance, 1076.
 effect of, upon will, 1242.

DUE PROCESS OF LAW,

contingent dower abolished by, 295.
 different in different proceedings, 1358.
 for partition of lands, 961.
 for taxation, 1358, 1359, 1386.
 proper listing, 1358, 1359, 1386.
 proper valuation, 1358, 1359, 1386.
 proper levy of tax, 1358, 1359, 1386.
 for tax-sale, 1358, 1386, 1387.
 See **TAX-DEED**; **TAX SALE**.
 actual sale, 1358, 1387.
 at time and place appointed, 1358, 1364, 1387.
 bona fide and without fraud, 1358, 1368-1371, 1387.
 continued liability of tax payer, 1358.
 notice of sale, 1358, 1363, 1386.
 public sale, 1358, 1368, 1387.
 nature of, 1358, 1387.

DUMPOR'S CASE, RULE IN, 559.

[References to sections]

DURESS,

- deed made under, voidable, 1077.
- disagreement of persons under, to deed, 1196.
- married woman under, of her husband, 308.
- of imprisonment, 1077.
- of threats, 1077.
- to child, 1077.
- to stranger, 1077.
- to wife, 1077.
- will void for, 1245.

DWELLING HOUSE,

- See BUILDING.
- meaning of, 17.

DYING WITHOUT ISSUE,

- limitation upon a, 182, 184, 867-874.
- See LIMITATION.

EASEMENT,

- abandonment of, extinguishes, 113.
- acquired by dedication, 1353.
 - by estoppel, 109.
 - See ESTOPPEL.
- by express exception, 101.
- by express grant, 100.
- by express reservation, 101.
- by implied grant, 102.
- by implied reservation, 105-107.
- by natural right, 99.
- by necessity, 103, 106, 111.
- by prescription, 108, 114, 1055, 1057.
- See PRESCRIPTION.
- adverse acts of servient owner extinguishes, 116.
- air as an, 127.
- appurtenant to land, 93, 94.
 - once, always, 94.

EASEMENT—Continued.

- burial rights in cemetery as, 130.
- by necessity, 103, 106, 111.
- cessation of purposes of, extinguishes, 111.
- classes of, 118-130.
- covenant against incumbrances includes, 1126.
- dedication creates, when, 1353.
- deed-necessary for, 109.
- distinguished from common, 70, 96.
- from license, 97.
- from profit a prendre, 70, 96.
- division fence as an, 124, 126.
- drainage as an, 104, 107, 114.
- drainage of surface water as an, 99, 128.
- See SURFACE WATER.
- drip as an, 129.
- equitable, created by contract to grant, 100.
- estoppel creates, 109.
- exception creates, 101.
- extent of enjoyment of, measured by needs of land, 94, 103, 114.
- or by terms of grant, 100.
- extinguishment of, by abandonment, 113.
- by adverse acts of servient owner, 116.
- by cessation of purposes of, 111.
- by change of condition of dominant tract, 114.
- by release, 112.
- by transfer of servient tract to purchaser without notice, 117.
- by union of dominant and servient tracts in one person, 115.
- grant creates, 100, 102.

[References to sections]

EASEMENT—Continued.

- in gross, 93.
- license to abstract, 132, 137.
 - regarded in equity as an, when, 136.
- lies in grant, not in livery, 100.
- light as an, 127.
- natural right to, 99.
- nature of, 92.
- necessity may create, 103, 106, 111.
- negative, 92.
- oral grant of, usually only a license, 100.
- party wall as an, 124, 125.
- passes with land, 1155.
- pew as an, 130.
- pollution of air or water as an, 103.
- positive, 92.
- prescription creates, 108, 114, 1055, 1057.
- prospect as an, 127.
- quasi, converted into, 104, 107.
- release of, extinguishes, 112.
- reservation creates, 101, 105-107, 1112.
- support of land and buildings as an, 122, 123.
- suspension of, 115.
- transfer of servient tract to purchase without notice extinguishes, 117.
- union of dominant and servient tract in one person extinguishes or suspends, 115.
- way as an, 103, 106, 111, 119-121.

EDUCATION,

- trust for, valid, 522, 1246.

EJECTMENT, ACTION OF,

- See EVICTION; CONDITION.
- against coparceners, 936, 937.
- against joint tenant, 887, 890.

EJECTMENT, ACTION OF—Continued.

- against tenant at will, 379, 380, 385.
- against tenant by sufferance, 387, 388, 389.
- against tenant for life, 220.
- against tenant for years, 371, 418.
- against tenants in common, 921, 923.
- building on land of another recoverable in, 23. •
- building or part thereof recoverable in, 23.
- by coparceners, 936, 937.
- by joint tenants, 887, 890.
- by mortgagee for land mortgaged, 630.
- by tenants in common, 921, 923.
- by trustee, for cestui que trust, 486, 487.
- consent rule in, abolished, 539.
- damages for detention of dower recoverable in, 354.
- damages recoverable in, 216, 387-389.
- defended by equitable title, when, 486.
- dower recoverable in, 352, 353.
- equitable estoppel as defense to, 486.
- improvements recoverable in, 216.
- profits recoverable as damages in, 389.
- right of entry when necessary for, 352, 539.
- substituted by partition suit, to what extent, 959.
- supported by equitable title when, 486.
- trustee to defend cestui's title in, 487.

[References to sections]

ELECTION,

by beneficiary that equitable conversion shall not occur, 20.
by widow between dower and jointure, 322, 325, 326.

See **JOINTURE; DOWER.**

by widow to take dower in exchanged lands, 292.
to take dower in land or rent, 289.

ELEGIT,

land subjected to debts under writ of, 165.
tenant by, has term for years, 359.
writ of, origin of judgment lien, 165, 692.
See **JUDGMENT LIEN.**
abolished in Virginia, 165, 692.

ELOPEMENT OF WIFE BARS DOWER, 306.**EMBLEMENTS,**

are fructus industriales, 39, 43.
See **FRUCTUS INDUSTRIALES.**
assignee of, entitled to, when, 48.
away going crops, 47.
crop not planted by tenant, 49.
definition of, 44.
disseisor not entitled to, 44.
license to enter and cultivate, 44.
mortgaged land, foreclosed, 50.
not prevented by judgment lien, 50.
preparation of land for planting, 44, 49.
rent for premises planted, 44.
requisites for, 45-50.
tenant by curtesy entitled to, 46.
tenant by sufferance not entitled to, 44.
tenant at will entitled to, 48, 382, 385.

EMBLEMENTS—Continued.

tenant during coverture or widowhood, 44, 46, 48.
tenant for life entitled to, 44, 46, 206.
tenant for life of another entitled to, 44, 46.
tenant for years when entitled to, 44, 46, 47, 373.
may hold to end of current year of tenancy, when, 46.
tenant in dower entitled to, 46, 293.
termination of tenant's estate by his own act, 48.
termination by title paramount, 50.
termination unexpected, 46, 47.

EMINENT DOMAIN,

dower barred by exercise of, 295, 304.
franchise subject to, 68.

EMPLOYEES, LIEN OF, 729.**ENTIRETIES,**

joint tenants hold by, 884, 885.
tenants by, 906-911.
See **ESTATES BY ENTIRETIES.**

ENTRY,

assignment of right of, 535-537, 1226.
by one cotenant enures to all, 887.
conveyance by exchange requires, 1202.
covenant for right of, 418.
curtesy in right of, 229, 232.
descent tolls, 145, 1019.
dower, before assignment, not a right of, 335, 337.
dower in right of, 267.
for breach of condition, 532.
See **CONDITION; RE-ENTRY.**

[References to sections]

ENTRY—Continued.

right of, distinguished from
seisin, 141.
upon tenant by sufferance, when
necessary, 387.

EQUITABLE CONVERSION,

arises when, 20, 474.
based on maxim that 'equity con-
siders that done which ought
to be done,' 20.
curtesy in, 239.
dower in, 268, 281, 283, 284.
in case of contract of sale, 20,
474, 1283-1315.
in case of devise, 20, 474.
in case of option to buy land,
474.
in case of partnership land, 21.
vendee's assignment of his inter-
est, 474.
vendee's interest is land by, 20.
vendor's interest is personalty
by, 20.

EQUITABLE ESTATE,

See TRUST; TRUSTEE; CONTRACT
TO CONVEY.

curtesy in, 239, 240.

dower in, 281-287, 299, 300.

**EQUITABLE JOINTURE BARS
DOWER, 322.**

See JOINTURE.

EQUITABLE MORTGAGE, 613.

See MORTGAGE.

EQUITABLE POWER, 1325.

See POWER.

**EQUITABLE SEPARATE ES-
TATE,**

See SEPARATE ESTATE.
condition restraining alienation
annexed to, 582.

**EQUITABLE SEPARATE ES-
TATE**—Continued.

conveyance of, by wife, 309, 311,
312, 1080, 1081.
conveyance of, by wife to hus-
band, 331.
curtesy in, 234, 240.
curtesy initiate in, 243, 244.
debts chargeable on, 1080.

**EQUITABLE WASTE, 434-436,
441, 442.**

See WASTE.

EQUITY,

compensation in, for mistake,
1184, 1187.
compromise sustained in, 1188.
contract to convey creates title
in, 20, 474, 1283-1315.
contract to devise creates title
in, 1283-1315.
See CONTRACT TO CONVEY; SPE-
CIFIC PERFORMANCE.
damages for dower in, 354.
dower recovered in, 352, 353.
easement arising in, 100.
escheat of equitable title in, 967.
foreclosure proceedings in, 633-
638, 639.
forfeitures relieved against in,
591-594.
intervention of, in case of deed
of trust, 671-677.
jurisdiction in, though land lie
outside State, when, 1184.
judgment lien enforced in, 699.
lashes in, 1051.
legal title prevails over an equal,
653, 657, 660.
what constitutes an equal, 653.
lost deed set up in, 1102.
married woman's separate es-
tate in, 1080, 1087.
See EQUITABLE SEPARATE ES-
TATE.

[References to sections]

EQUITY—Continued.

- mechanics' lien enforced in, 725.
- oral compromise of boundary good in, 1036.
- partition suit in, 958-965.
- penalties relieved against in, 591-594.
- power coupled with trust enforced in, 1330.
- power defectively exercised aided in, 1338.
- power fraudulently exercised in, 1339.
- power taking effect in, 1325.
See **POWER**.
- prior in time prevails over later superior, 653.
what constitutes a superior, 653.
- reformation of deed in, 1187.
- rescission of deed in, for mistake, 1184, 1186, 1187, 1188.
- sale of contingent or vested interests in, 804.
- sale of infants' lands in, 1075.
- sale of insane person's lands in, 1073.
- statute of limitations applied in, 1051-1053.
- trusts cognizable in, 459.
See **TRUST**.
- waste remediable in, 434-436, 442.

EQUITY OF REDEMPTION,

- See **MORTGAGES; DEED OF TRUST**.
- a resulting trust, 601.
- a title in equity, not a mere trust, 600, 602.
- barred by lapse of twenty years, 620, 626.
- cognizable in equity only, 602.
- contrasted with legal title, 602.
- conditions of redemption, 621-624.

EQUITY OF REDEMPTION—

Continued.

- creditors may subject, 602.
See **CREDITOR**.
- curtesy in, 239.
- descendible, 602.
- dower in, 286, 287, 602.
- effect at law of non payment of mortgage, 599.
- exercisable within reasonable time, 620.
- future advances 624.
- inseparably incident to mortgage, 601.
- Judgment a lien on, 693.
- mortgage of, 657.
- nature of, 600.
- origin of, 600.
- perpetual, in Welsh mortgage, 620.
- reasons for, 600.
- tacking of debt as condition of redemption, 622-624.

ERASURE,

- in deed, 1190-1192.
- in executory contract, 1191, 1192.
- in will, 1266, 1269.

ESCHEAT,

- alien's land liable to, 967.
- alien enemy's land liable to, 967, 1089.
- arises partly by act of law, partly by act of parties, 967.
- attainder of treason or felony subjects land to, when, 967.
- bastard's land liable to, 967.
- by escheator and his jury, 967.
- corporation's land liable to, 967, 1085, 1095.
- decendent's land liable to, when, 967.
- equitable title liable to, 487, 967.
- fee simple liable to, 167, 967.

[References to sections]

ESCHEAT—Continued.

- heirs of half blood, 967.
- incident to feudal tenure, 13.
- trustee's legal title liable to, 499.

ESCROW, DELIVERY OF DEED IN, 1144.**ESTATE**,

- classification, 147.
- distinguished from title, 138.
- in rent granted depends on agreement, 88.
- in rent reserved measured by tenant's, in land, 88.
- maximum, in rent service, 89.
- meaning of, 138.
- voidable, subject to confirmation, 1221.

ESTATE AT WILL,

- See **ESTATE FROM YEAR TO YEAR; LANDLORD AND TENANT; LEASE**.
- assignee of, a tenant by sufferance, 380.
- assignment of, terminates, 380.
- attempt to surrender, terminates, 1213.
- converted into estate from year to year, 378, 390.
- emblems incidental to, 382, 385.
- See **EMBLEMENTS**.
- estovers incidental to, 381.
- See **ESTOVERS**.
- expressly created at will of both parties, 378.
- at will of one party only, 379.
- how created, 378.
- implied, upon permissive occupation, 378.
- incidents of, 381.
- lease determinable at option of one party, 379.

ESTATE AT WILL—Continued.

- nature of, 378.
- not a freehold, 378.
- notice to quit not necessary, 385.
- option to terminate exercised, 385.
- permissive waste an incident of, 383, 385, 438, 439.
- reasonable time to remove effects, 385.
- remainder cannot be limited after, 734.
- rent, 384, 385.
- See **RENT**.
- sublease of, 380.
- surrender of, terminates, 1213.
- termination of, 385.
- waste, 383, 385, 438, 439.
- widow's quarantine an, 338.

ESTATE BY ENTIRETIES, 906-911.

- See **TENANT BY ENTIRETIES**.
- in premises of deed, converted by habendum into estate in husband alone, 1110.

ESTATE BY SUFFERANCE,

- acceptance of rent converts, into estate from year to year, 389.
- assignment of, terminates, 387.
- conversion of, into estate from year to year, 386, 390.
- demand of possession necessary to action against tenant of, 387.
- entry upon, by landlord, 387.
- estate at will converted into, upon assignment or sublease, 380.
- estate for years converted into, by tenant holding over, 386.
- estate from year to year converted into, 390.

[References to sections]

ESTATE BY SUFFERANCE—

Continued.

forcible expulsion from, exposes landlord to action, 388.

nature of, 386.

not properly an "estate," 386.

profits of, recoverable as damages in ejectment, 389.

rent as incident to, 389.

tenant of, not a trespasser, 386, 387.

tenant of, not to be forcibly expelled, 388.

See also, ESTATE FROM YEAR TO YEAR; LANDLORD AND TENANT.

ESTATE FOR LIFE,

See FREEHOLD; LIFE ESTATE.

ESTATE FOR YEARS,

See LANDLORD AND TENANT; LEASE; CONVEYANCE.

alienation of, 371.

assignment of, 371.

chattel interest, 357.

commencement of, 367.

commencing in futuro, 368, 369.

condition implied in, 371, 526.

condition restraining alienation annexed to, 371, 588

contingent remainder of freehold preceded by, good as executory limitation, 734, 745.

contract for lease of, by parol, 363, 369, 1099.

distinguished from lease of, 369.

in writing, 363, 369, 1100, 1101.

specific enforcement of.

See SPECIFIC PERFORMANCE.

covenant of renewal in lease of, 359.

created by contract to lease, 363, 369.

ESTATE FOR YEARS—Continued.

by lease, 359, 362, 369, 1099-1101.

by estoppel, 364.

date of lease creating, 367.

deed necessary for, when, 362, 363, 369, 1099-1101.

definition of, 358.

delivery of lease creating, 367.

descends to personal representative, 357.

distinguished from "lodgings," 365, 366.

emblems incident to, when, 373.

See EMBLEMENTS.

entry necessary to consummate, 360.

constructive under statute of Uses, 362.

equitable title to, under contract to lease, 363.

estate from year to year an, 390.

estate under writ of elegit an, 359.

estoppel creating, 364.

estovers incident to, 372.

See ESTOVERS.

exclusive possession of tenant of, 376.

executory limitation in, 357, 368, 369.

fee tail in, 357.

fixed duration necessary to, 359.

future estates in, 357, 368, 369.

in after acquired title, 364.

in incorporeal property, 365.

in part of house, 365.

in rents, 88.

incidents of, 370.

indenture not necessary to creation of, by estoppel, 364.

interesse termini, 360.

[References to sections]

ESTATE FOR YEARS—Continued.

lease creating, 359, 362, 363, 369, 1099-1101.

life estate in, 357.

"lodger" distinguished from tenant of, 365, 366.

merger of, 375.

See **MERGER**.

nature of, 357, 358.

origin of, 357.

parol lease creating, 362, 363, 369, 1099-1101.

part performance of contract to lease, 363.

remainder after, 734.

remainder in, 357.

repairs, 374.

statute of Frauds applied to, 362, 363, 369, 1099-1101.

sublease of, 371.

"term" explained, 360.

tortious alienation of, 371.

trespass by landlord, 376.

trespass by tenant of, 376.

waste, 374, 438, 439, 441, 443.

See **WASTE**.

writing to create, 363, 369, 1099-1101.

ESTATE FROM YEAR TO YEAR,

See **ESTATE AT WILL**; **ESTATE BY SUFFERANCE**; **LANDLORD AND TENANT**; **LEASE**.

acceptance of rent creates, 390.
arises from estate at will, 378, 380, 385, 390.

from estate by sufferance, 386, 389, 390.

classified as an estate for years, 390.

converted into estate by sufferance, 390.

ESTATE FROM YEAR TO YEAR—Continued.

from month to month, 390, 391.

from quarter to quarter, 390, 391.

incidents of, same as estates for years, 390.

nature of, 390.

notice to quit, 385, 390, 391, 392.

origin of, 390.

repairs, 390.

terms of prior lease control, 390.

waiver of notice to quit, 392.

waste by tenant of, 439.

ESTATE IN FEE SIMPLE,

See **FEE SIMPLE**.

ESTATE OF INHERITANCE,

See **FEE QUALIFIED**; **FEE SIMPLE**; **FEE TAIL**.

coparcener's estate always an, 931.

curtesy in any, 223.

dower in any, 260, 261, 272, 273.

prescriptive title limited to, 1067.

ESTATE PUR AUTER VIE,

See **FREEHOLD**; **LIFE ESTATE**; **OCCUPANCY**.

ESTATE TAIL,

See **FEE TAIL**; **FEE SIMPLE**.

ESTOPPEL,

after acquired title transferred by, 1133, 1348-1350.

arising from ancient warranty, 1114, 1116.

arising from representations, land transferred by, 1351.

contingent remainder transferred by, 803, 1348-1350.

covenant of title transfers land by, 1133, 1348-1350.

does not arise in case of married woman's deed, 1133.

[References to sections]

ESTOPPEL—Continued.

dower barred by, 332.
 easement created by, 109.
 equitable, no defense to ejectment, 486.
 feoffment transfers land by, 1348.
 fine transfers land by, 1348.
 lease transfers land by, 364, 1349.
 of debtor to set up equity against assignee of mortgage, 643.
 of tenant to deny landlord's title, 212, 402.
 of warrantor to claim land warranted, 1114, 1116.
 of warrantor's heirs, 1114, 1116.
 power extinguished by, 1344.
 subsequent title acquired by one as trustee, 1133.

ESTOVERS,

common of, 73, 74.
 incident to estate at will, 381.
 incident to estate for life, 207.
 incident to estate for years, 372.
 incident to estate from year to year, 390, 372.
 nature of, in general, 41.

ESTREPEMENT, WRIT OF,
439, 442.**EVICION,**

See DISSEISIN; TITLE PARAMOUNT.
 actual or constructive, 419.
 apportionment of rent upon tenant's, 90, 412, 419.
 constructive, 419.
 curtesy upon wife's, by title paramount, 235.
 damages for, upon ancient warranty, 1114, 1115.
 upon covenants of title, 1132.
 See COVENANT.

EVICION—Continued.

dower upon husband's, by title paramount, 266, 280.
 exchange implies a condition against, 1202.
 also a warranty, 1202.
 of tenant by landlord, 403, 412, 419.
 by third person, 403, 412.
 warranty against, 1114, 1115, 1132, 1202.
 See COVENANT; WARRANTY.

EVIDENCE,

See PAROL.
 acknowledgment as, for purpose of registry, 1142, 1145.
 for other purposes, 1142.
 alteration of writing by parol, 47, 601, 1232, 1315.
 ancient deed as, of its own genuineness, 1145.
 burden of proving grantor insane, 1073.
 certificate of acknowledgment as, 1397, 1398.
 clerk's certificate of admission to record as, 1393.
 consideration for deed proved by parol, 1232.
 declarations as, of intent to deliver deed, 1141.
 decree of court as, of title passed by lost deed, 1102.
 deed an, of conveyance, not itself one, 1102.
 deed absolute on face, shown to be a mortgage by parol, 601.
 discharge of written contract shown by parol, 1315.
 fraud shown by parol, 1315.
 general expressions in writing as, of intent to exercise a power, 1334.

[References to sections]

EVIDENCE—Continued.

handwriting as, for registry, 1142, 1145.

indirect trust established by parol, 467, 468, 470, 475, 476, 479.

rebutted by parol, 475, 476.

long possession under deed prima facie, of genuineness, 1035.

lost will as, of revocation, 1269.

mistake shown by parol, 1315.

mutilated will as, of revocation, 1269.

of acceptance of dedication, 1355.

of birth of child alive for curtesy, 242.

of death of husband for dower, 279.

of dedication, 1354.

of fraud.

See FRAUD.

of infants' repudiation of conveyance, 1074.

of insanity to avoid a deed or will, 1073, 1242, 1243.

of local custom to alter or vary written lease, 47.

of mistake of fact, 1186.

of notice to purchaser under registry law, 1411-1413.

See NOTICE.

of witnesses to authenticate writing, 1142, 1145, 1395.

of witnesses to prove will, 1254, 1255-1259.

office copy of probated will as, 1281.

office copy of duly recorded deed as, 1401.

power of attorney strictly construed, 1105.

registry of deed as, 1142.

EVIDENCE—Continued.

tax deed as, of purchaser's title, 1386, 1387.

way by necessity inferred from uselessness of land without way, 103, 106.

EXCEPTION,

construed as reservation, 101.

distinguished from reservation, 101.

easement created by, 101.

fixture severed by, becomes personality, 36.

fructus industriales severed by, become personality, 42.

"heirs" need not be used in, 155.

life estate created by, 199.

meaning of, 101.

EXCHANGE,

a common law conveyance, 1202.

condition implied in, against eviction, 1202.

conveyance purporting to be an, good as a grant, 1202.

deed indented necessary to, when, 1202.

distinguished from transfer by mutual conveyances, 1202.

distress for rent granted upon an, 87.

dower in lands passing by, 292.

entry required for, 1202.

equality of estates passing by, 1202.

judgment lien upon lands passing by, 1404.

livery of seisin not necessary for, 1202.

nature of, 292, 1202.

of infant's land by statute, 1075.

power of sale does not authorize an, 1321.

requisites for, 1202.

[References to sections]

EXCHANGE—Continued.

warranty implied in an, 1202.
word "exchange" necessary to an, 1202.

EXECUTION,

fructus naturales not subject to, 40.
growing crops, if mature, subject to, 43.
real fixtures not subject to, 36.

EXECUTOR,

arrears of rent go to, 410.
as attesting witness to will, 1258.
estate for years passed to, 357.
land devised to, with power to sell, 1317.
power coupled with a trust given to, exercised by successor or co-executor, 1331, 1332.
power in joint, exercisable severally, 1332.
resignation, refusal to qualify, death, etc., of one, 1332.
power of sale in, implied, 1328.
power in, is coupled with a trust when, 1330.
power in, to sell land at common law, 1323.
power in, to sell land for payment of debts not exercisable if there are no debts, 1322.
to pay off mortgage, 641.
to receive payment of mortgage, 640.

EXECUTORY LIMITATION,

abeyance of freehold, 824.
adverse possession against one claiming by, 1049.
alternative, 840, 851.
any number of, may succeed each other, 860.
conditional limitation, 828, 829.
classes of, 823-830.

EXECUTORY LIMITATION—Continued.

contingent remainder following term for years good as an, 734, 745.
contingent, 827, 828, 829.
created under statutes of Uses, Wills and Future Grants, 821, 823, 834, 1230, 1237.
cross, 788, 841.
curtesy in, 250, 836.
definition of, 821.
definite failure of issue, etc., 855, 857, 871, 873, 874.
destruction of, 835.
disposition of title to, pending contingency, 863, 864.
distinguished from remainder, 831-837.

See REMAINDER.

dower in, 250, 280, 836.
failure of first estate to take effect, 838.
failure or regular termination of ulterior limitation, 839.
if one limitation in writing be, all subsequent are also, usually, 859.
in chattels, 357, 830, 833.
in estate for years, 357.
indefinite failure of issue, etc., 854-857, 867-874.
liability of, for debts, 865.
limitation in derogation of preceding estate good as an, 795.
limitations by way of.
See LIMITATION.
must not cease as to part, and vest and revest, 861.
no limitation once good as remainder can be, 822.
preceding estate dispensed with in case of, 832.

[References to sections]

EXECUTORY LIMITATION —

Continued.

power taking effect as, 1325.

See **POWER**.remainder void as such good as
an, 734, 745, 795, 822.rule against perpetuities applied
to, 842-857, 859, 860, 862, 866,
869, 870, 871, 873, 874.See **RULE AGAINST PERPETUITIES**.rule in Shelley's Case not appli-
cable to, 837.See **RULE IN SHELLEY'S CASE**.

shifting, 828, 829.

always contingent, 829.

preceding estate vested or con-
tingent, 829.

springing, 825-827.

construed to be vested if pos-
sible, 825.

contingent, 827.

to a class, vested, 826.

vested, 825, 826.

statutes which give rise to, 821,
823, 834, 1230, 1237.substitution of one fee for an-
other by way of, 737.

to person not in esse, 862.

or en ventre sa mere, 862.

to unborn bastard, 862.

transfer of, 865.

trusts of accumulation, 866.

ulterior limitation void, 839, 858.

**EXONERATION OF DOWER
OUT OF LAND DESCENDED
OR DEVEISED, 339.****EXTINGUISHMENT,**

of easement, 110-117, 1355.

See **EASEMENT**.

of mortgage, 646, 662.

of powers, 1344.

See **POWER**.**EXTINGUISHMENT—Cont'd.**of wife's contingent dower by
release, 275, 295, 1210.

release operating by way of, 1210.

See **RELEASE**.**FALSA DEMONSTRATIO NON
NOCET, ETC., 1147.****FEDERAL COURT JUDG-
MENTS, RECORDATION OF,
701.****FEE QUALIFIED,**

curtesy in, 248.

distinguished from fee simple,
168.distinguished from fee upon con-
dition, 169.from descendible freehold, 170,
171.

dower in, 248, 280.

incidents of, 172.

nature of, 168, 169.

no remainder after, 737.

quasi reversion after, 171.

FEE CONDITIONAL,converted into fee simple on
birth of issue, 174.converted into fee tail by statute
de donis, 176.in annuities and corodies remains
as at common law, 178, 194.

nature of, 174.

objections to, 175.

FEE FARM RENTS, 88.**FEE SIMPLE,**

alienation of, 162.

condition restraining alienation
annexed to, 579-586.

creditors may subject, 165.

curtesy and dower in, after fail-
ure of heirs, 247, 280.

[References to sections]

FEE SIMPLE—Continued.

descendible to heirs general, 163.
distinguished from fee qualified,
168.

escheat of, 167, 967.

See **ESCHEAT**.

fee conditional converted into,
on birth of issue, 174.

fee tail converted into, by statute,
194, 195.

See **FEE TAIL**.

forfeiture of, 166, 526.

implied conditions annexed to,
526.

in A, created by gift "to A for
support of herself and her children,"
183.

in A, created by gift "to A for
life, and what remains undisposed
of, over," etc., 162, 1328.

in habendum, preceded by fee tail
in premises, 1110.

in premises, followed by life estate
in habendum, 1110.

See **HABENDUM**; **PREMISES**.

joint, in premises, reduced by
habendum to life estate in one
with remainder to other, 1110.

in rents, 88, 89.

See **RENT**.

incidents of, 161-167.

nature of, 149.

no remainder after, 734, 737.

origin of, 150.

reduced to fee tail by implication,
184.

rent apportioned in case of death
of reversioner in, 221.

See **RENT**.

substitution of one, for another,
149.

union of, in dominant and servient
tracts, extinguishes easement,
115.

2 Min. Real Prop—45

FEE SIMPLE—Continued.

upon condition, distinguished
from fee qualified, 169.

See **CONDITION**.

variable as to place and person
of owner, 149.

words of inheritance necessary
to create, 150-160.

See **WORDS OF LIMITATION**; **RULE
IN SHELLEY'S CASE**.

FEE TAIL,

a lesser estate than fee simple,
176.

after possibility of issue extinct,
192.

alienability of, 186, 188-191.

arises by conveyance of "gift,"
1199.

arises by implication in will, 182-
184.

arises by "frank marriage," 185.

barring of, 188-190, 191.

Carter v. Tyler, applied to, 869.

children made insubordinate by,
186.

common recovery bars, 188, 189.

condition restraining alienation
annexed to, 587, 794.

converted by Virginia statute
into fee simple, 194, 195.

first created, then converted
into fee, 195.

created by statute de donis, 176.

creditors defrauded by, 186.

curtesy in, 191.

curtesy in, after failure of issue,
247.

curtesy in special, 238.

deed enrolled in chancery bars,
189, 190.

devise "to A for life, and if he
die without issue, to B," creates,
182, 868, 873.

[References to sections]

FEE TAIL—Continued.

devise "to A for life, remainder to his children" creates, when, 183.
 devise "to A and his heirs, and if he die without heirs to B" creates, when, 184.
 devise "to unborn person for life, remainder to his child," etc., creates, when, 182.
 devise "to A and his children" creates, when, 183.
 dower in, 191.
 dower in, after failure of issue, 247, 280.
 dower in special, 278.
 fee conditional converted into, 176.
 fee simple reduced to, by implication, 184.
 female, 179.
 fine bars, 188, 189.
 forfeiture of, for treason, 186, 189, 191.
 general, 179.
 implied condition annexed to, 794.
 in annuity, 178.
 in chattels, 178, 357.
 in corody, 178.
 in estate for years, 357.
 in premises of deed, followed by fee in habendum, 1110.
 in rents, 88, 89.
 in tenements only, 178.
 inalienability of, 186, 188-191.
 incidents of, 191.
 lessees ousted by, 186.
 male, 179.
 merger of, 191.
 mischiefs of, 186.
 nature of, 176-179.
 origin of, in statute de donis, 176, 177.

FEE TAIL—Continued.

property wherein there may be, 178.
 reversion after, 177.
 rule in Wild's Case applied to, 183.
 rule in Shelley's Case applied to. See **RULE IN SHELLEY'S CASE**.
 Taltarum's Case as barring, 188.
 treasons encouraged by, 186, 189, 191.
 waste not an incident of, 191, 437.
 words of limitation to create, 180, 181.
 See **WORDS OF LIMITATION**; **RULE IN SHELLEY'S CASE**.

FELONY,

attainder of, affecting parties to deeds, 1083, 1096.
 affects descent, 167, 967.
 forfeits land, 166.

FENCE,

division, 124, 126.
 duty of landowner to, 126.
 railroad's duty to, 126.

FEOFFMENT,

a common law conveyance, 1197, 1198.
 a tortious conveyance, 210, 1198.
 See **TORTIOUS CONVEYANCE**.
 after acquired title passed by, 1348.
 See **ESTOPPEL**.
 applies to corporeal property only, 1198.
 contrasted with "grant," 1201.
 conveyance intended as, sustained as bargain and sale, etc., 1236, 1237.
 deed not necessary to, at common law, 1198.

[References to sections]

FEOFFMENT—Continued.

- form of deed of, 1107.
- livery of seisin required for, 1198.
- use created by, 450, 451, 456.

FERRY, 67-69.**FEUDAL TENURE**,

- classes of, 6.
- conversion of military, into socage, 14.
- in U. S. and in Virginia, 15, 16.
- incidents of, 7-13.
- introduction of, into England, 3.
- nature of, 4.
- origin of, 2.
- statute of Quia Emptores, 5.
- subinfeudation, 5.
- uses not subject to, 448.

FIDUCIARY,

- as grantee in deed, 1097.
- cannot purchase at tax sale, 1370.
- fraudulent dealings by, 1097, 1164.

FINE,

- a tortious conveyance, 210.
- See **TORTIOUS CONVEYANCE**.
- after acquired title transferred by, 1348.
- See **ESTOPPEL**.
- fee tail barrable by, when, 189, 190.
- for alienation, 4, 5, 12.
- married woman's conveyance by, 308, 1079.
- See **MARRIED WOMAN**.
- nature of, 308, 1079.

FIRE,

- apportionment of rent upon destruction of leased building by, 90.
- See **RENT**; **COVENANT**.

FIRE—Continued.

- injuries to premises by, when waste, 426, 428, 433.
- See **WASTE**.
- tenant's duty to rebuild premises destroyed by, 216, 374, 390, 416, 426, 433.
- See **REPAIR**; **WASTE**; **COVENANT**.

FISHERY,

- common, 73.
- not subject of prescription, 1057.
- common of, 73, 74.
- dower in, 289.
- license of, 132.

FIXTURE,

- actual severance of, 36.
- adaptation of, for use with freehold, 29.
- agricultural, 32, 33.
- ambiguity of term, 24.
- annexed by fee simple owner, 36.
- annexed by tenant at will, 37.
- annexed by tenant for life, 38.
- annexed by tenant for years, 37.
- as between debtor and creditor, 36.
- as between executor and heir, 36.
- as between landlord and tenant, 37.
- as between mortgagee of, and mortgagee of land, 27.
- as between mortgagor and mortgagee, 36.
- as between tenant for life and reversioner or remainderman, 38, 214.
- as between vendor and vendee, 36.
- assent of owner of, necessary, 23, 25.

[References to sections]

FIXTURE—Continued.

assent of owner of land not necessary, 25.

attached to land or structures, 25.
building as, 23.

See BUILDING.

constructive severance of, 36.

definition of, 25.

domestic, 34.

express agreement as to permanency of annexation, 27.

identity of, lost, 23, 25.

intention to annex, permanently, 25-38.

interest in land as showing intent, 35-38.

license to annex, 27.

manure as, 33.

nature of, 24.

ornamental, 34.

personal, 24.

personality of one annexed to land of another, 27.

personality subject to mortgage annexed to land, 27.

purposes and nature of, show intent, 30-34.

real, 24.

removal of, waste, 37, 214, 432.

severance of, 36.

trade, 31.

transfer of, under statute of Frauds, 36.

See STATUTE OF FRAUDS.

FLOODING OF LAND OF UPPER PROPRIETOR, 57, 132.

See EASEMENT.

FLOW, OBSTRUCTION OF, 57.

See WATER RIGHTS; EASEMENT.

FORCE,

See DURESS.

effect of, upon deed, 1077.

effect of, upon will, 1245.

FORCIBLE ENTRY, UPON TENANT BY SUFFERANCE, 388.**FORECLOSURE OF MORTGAGE**, 610, 633-638, 639.

See MORTGAGE; DEED OF TRUST.

FOREIGN MINISTERS OR OFFICIALS,

acknowledgment made before, 1397.

See ACKNOWLEDGMENT.

FORFEITURE,

equitable relief against, 591-594.

for breach of express condition, 531-539.

for breach of implied condition, 210-212, 371, 526.

See CONDITION.

for felony, 166, 967.

for non-listing of land for taxation, 1357.

for non-payment of tax, 1357.

for treason, 166, 967.

for waste, 440.

of preceding estate for breach of implied condition defeats contingent remainder when, 780-782.

See CONTINGENT REMAINDER; REMAINDER.

waiver of, for breach of condition, 560.

See WAIVER.

FORTHCOMING BOND, LIEN OF, 709.**FRANCHISE**,

canal, 67.

creation of, by prescription, 1055, 1057.

See PRESCRIPTION.

definition of, 67.

dower in, 289.

[References to sections]

FRANCHISE—Continued.

eminent domain applied to, 68.
 exclusiveness of, 69.
 ferry, 67.
 grist mill, 67.
 impairment of contract of, 68.
 misuser of, 68.
 monopoly not favored, 69.
 non user of, 68.
 police power applied to, 68.
 real property only when connected with land, 67.
 rescission of, 68.

FRANK MARRIAGE, 185.**FRAUD**,

See **FRAUDULENT CONVEYANCES**.
 advantage taken of pecuniary difficulties as, 1165.
 agreement in, of a power not specifically enforceable, 1314, 1339.
 agreement to return part of wife's portion as, 1166.
 antenuptial conveyance in, of curtesy or dower, 297, 1166.
 appointment in, of a power relieved against in equity, 1339.
 badges of, 1174.
 burden of proof of, 1173.
 by concealment, 1162.
 by misrepresentation, 1162.
 by persons in confidential relations, 1164.
 certificate of acknowledgment impeachable for, 1398.
 circumstantial evidence to show, 1173.
 clerks certificate of admission to record impeachable for, 1393.
 considerations involving, 1160-1184.
 See **FRAUDULENT CONVEYANCE**.
 constructive trust raised by, 482.

FRAUD—Continued.

conveyance voluntary as badge of, 1179-1182.
 See **VOLUNTARY CONVEYANCE**.
 deed misread to grantor as, 1135, 1161.
 dower barred by wife's, when, 332.
 dower in land obtained by, 263.
 dower in land conveyed by husband and wife, which is void for husband's, 314.
 drunkard's deed voidable for, 1076.
 equity assumes jurisdiction of, though land lies outside Virginia, 1184.
 equity relieves against appointment in, of power, 1339.
 equity relieves against non-execution of power due to, 1338.
 estoppel of tenant to deny landlord's title, how affected by, 402.
 estoppel arising from, gives title to land when, 332, 1351.
 evidence of, in general, 1163, 1173, 1174, 1175, 1176, 1179.
 greater ratio secured to one creditor for assenting to deed of assignment as, 1166.
 in auction sales, 1305.
 in esse contractus, 1161.
 "in pari delicto," etc., 1170.
 inadequacy of consideration as evidence of, 1163, 1174.
 mental weakness as evidence of, 1163, 1164, 1170.
 must be clearly shown, 1162.
 must be shown to exist at date of instrument, 1173.
 "nemo allegans suam turpitudinem," etc., 1170.
 never to be presumed, 1162.

[References to sections]

FRAUD—Continued.

no right deductible from a, 1162.
 notice of an equity attaches to purchaser the guilt of, 1411.
 parol evidence to establish, 1315.
 partition avoided by, 903.
 party to, cannot impeach transaction, 1170.
 payment of taxes prevented by, 1386.
 postponement of sale under assignment as, 1174.
 preference of creditors as, 1177.
 presumed in case of postnuptial settlement by husband, 1181.
 purchaser, to avoid, must be "complete purchaser," 1183.
 redemption of delinquent land prevented by, 1386.
 release of grantor from further liability for debts as, 1176.
 reservation of benefits or control by grantor as, 1175.
 of exempt property, 1176.
 secured creditor may attack deed for, 1173, 1178.
 signing wrong paper as, 1161.
 signing prevented by, takes contract out of statute of Frauds, 1291.
 specific performance of contract tainted with, 1305.
 statute of limitations applied in cases of, 1053.
 subrogation of creditor successfully attacking secured debt for, 1171.
 suggestio falsi, as, 1162.
 suppressio veri as, 1162.
 tax deed procured by, void, 1382.
 tax sale tainted with, void, in spite of deed, 1387.
 unavailing against "complete purchaser," 1183.

FRAUD—Continued.

undue influence as, 1163, 1164.
 will void for, 1245.
 writing prevented by, takes contract out of statute of Frauds, 1291.

FRAUDS, STATUTE OF,

See STATUTE OF FRAUDS.

FRAUDULENT CONVEYANCES,

See FRAUD.

badges of fraud, 1174, 1175, 1176, 1177.

burden of proving fraud, 1173.
 catching bargains with heirs and other expectants, 1165.

circumstantial evidence of fraud, 1173.

constructive trusts created by, 482.

conveyances in fraud of curtesy or dower, 297, 1166.

"creditors" under statute of, 1171.
 have lien from time of filing bill, 1171.

See CREDITOR.

dower in, 295, 314.

effect of voluntary conveyance, 1179-1182.

See VOLUNTARY CONVEYANCE.

English statutes of, 1168.

evidence of fraud in general, 1162, 1173, 1174, 1175, 1176, 1177, 1179.

See FRAUD.

fraud against creditors and purchasers, 1167-1184.

fraud against third persons generally, 1166.

fraud as between the parties, 1161-1164, 1170.

fraud in esse contractus, 1161.

[References to sections]

FRAUDULENT CONVEYANCES—Continued.

fraudulent representations and concealments, 1162.
inadequacy of price as evidence of fraud, 1163.
inequitable bargains, 1163.
joinder of wife in husband's, 314.
mental weakness as proof of fraud, 1164.
postnuptial settlements by husband, when, 1182.
"purchasers" under statute of, 1172, 1183, 1409, 1410.
See PURCHASER; COMPLETE PURCHASER.
statute of limitations applied to, 1053.
Virginia statute of, 1169.

FREE BENCH, CUSTOM OF, 6.

FREEHOLD,

abeyance of, 146, 448, 449.
act of law creates no estate less than, 357.
cannot be carved out of chattel interest, 139.
classification of estates as, and less than, 147.
contingent remainder of, to be preceded by, 734.
curtesy requires possession of, 236, 273.
curtesy requires seisin of inheritance, without intervening estate of, 236, 237, 273, 276, 277.
deed necessary for conveyance of, when, 1099-1101.
See DEED; STATUTE OF FRAUDS.
definition of, 139.
descendible, distinguished from fee qualified, 170.
disseisin of, 145.
See DISSEISIN; ADVERSE POSSESSION.

FREEHOLD—Continued.

dower assigned by tenant of, 346.
dower released to tenant of, 313, 331.
dower requires possession of, 236, 273.
dower requires seisin of inheritance, without intervening estate of, 236, 237, 273, 276, 277, 302.
general terms of description in will, as "all my lands," includes only, when, 1249.
in one, inheritance in another, 140.
interpolated prevents dower or curtesy, when, 237, 276, 277.
interpolated prevents merger, when, 276, 277, 817.
livery of seisin necessary to create, when, 142, 143, 144.
See LIVERY OF SEISIN.
livery of seisin to particular tenant, in case of remainder of, 734.
meaning of, 139, 140.
rent, 79, 88, 89.
See RENT.
torn in removing fixture, 28.
See FIXTURE; WASTE.

FRUCTUS INDUSTRIALES,

after maturity and before severance, land for some purposes, 43.
for other purposes, personalty, 43.
after severance, always personalty, 43.
before maturity, part of land, 43.
distinguished from fructus naturales, 39.
emblems, 44-50.
See EMBLEMENTS.

[References to sections]

FRUCTUS INDUSTRIALES —

Continued.

sale of, not within statute of
Frauds, 43, 1286.distinguished from license,
1286.distinguished from fructus indus-
trialis, 39.license to enter and cut, 42, 1286.
nature of, 40.

part of the land, 40.

pass with land, when, 40.

pass to the heir, 40.

sale of, within statute of Frauds,
42, 1286.

severance of, 42.

**FUTURE ADVANCES, MORT-
GAGE TO SECURE, 624.****FUTURE ESTATES,**See EXECUTORY LIMITATION;
REMAINDER; REVERSION.**FUTURE GRANTS,**conveyances under statute of,
1201.

See CONVEYANCES.

statute of, 1201.

See STATUTE OF FUTURE GRANTS.

GAME,license to remove, implied from
license to hunt, 132.**GAS, RIGHTS IN NATURAL,
64.****GAVELKIND TENURE, 6.****GENERAL CONTRACTOR,**

defined, 714.

lien of, 715-717, 720.

See MECHANIC'S LIEN.

GIFT,

See VOLUNTARY CONVEYANCE.

GIFT—Continued.

a common law conveyance, 1199.

creates a fee tail, 1199.

oral, or oral promise of, not en-
forceable in equity, when, 1297.**GOVERNMENT SURVEY,**

description of land by, 1149.

See DESCRIPTION.

**GRAND SERGEANTY, TE-
NURE BY, 6.****GRANT,**

a common law conveyance, 1201.

an innocent conveyance, 1201.

appointee under power, though
not within consideration, may
take by, 1329.

deed always required for, 1201.

deed invalid as a bargain and
sale sustained as a, 1232.deed invalid as a confirmation
sustained as a, 1223.deed invalid as a covenant to
stand seised sustained as a,
1232.deed invalid and an exchange sus-
tained as a, 1202.deed invalid as a feoffment sus-
tained as a, 1236, 1237.deed invalid as a release sus-
tained as a, 1208, 1209.deed invalid as a surrender sus-
tained as a, 1217.

easements lie in, 100.

See EASEMENT.

easements of light and air ac-
quired by, 127.

feoffment contrasted with, 1201.

future estates created by, 1201.

land now passes by, 142, 1201,
1057.livery of seisin contrasted with,
142.

See LIVERY OF SEISIN.

[References to sections]

GRANT—Continued.

- no consideration needed for, 1201.
- of easement, 100, 127, 1201.
- of incorporeal hereditament, 100, 142, 1201.
- of profit a prendre, 70.
- See PROFIT A PRENDRE.
- of rent, 77, 78.
- See RENT.
- of reversion, 142, 407, 424.
- of vested remainder, 142, 802.
- See VESTED REMAINDER; REMAINDER.
- of use, 448.
- prescriptive title supposes lost, 1057.
- applies only to property lying in, 1057.
- See PRESCRIPTION.
- surrender by, without livery, 1216.
- takes place of livery, when that is impossible, 1201.

GRANTEE,

- See PURCHASER; ASSIGNEE.
- action by, against clerk for not admitting deed to record, 1393.
- capacity of, 1086-1097, 1106.
- See CAPACITY.
- dead at date of deed, 1088.
- description of.
- See DESCRIPTION; PREMISES.
- uncertainty of, avoids deed, 1087.

GRANTOR,

- capacity of, 1073-1085, 1106.
- See CAPACITY.
- description of.
- See PREMISES; DESCRIPTION.

GRANTS, STATUTE OF, 142, 1201.

- conveyances under, 1235-1237.
- See CONVEYANCE; GRANT.

GRASS, AS PART OF LAND,

- See FRUCTUS INDUSTRIALES; FRUCTUS NATURALES.

GRAVEYARD, BURIAL RIGHTS IN, 130.**GRIST MILL, A FRANCHISE,** 67-69.**GROUND RENT,** 88, 89.

- See RENT.

GROWING CROPS,

- See FRUCTUS INDUSTRIALES; EMBLEMENTS.

GROWING FRUIT, TREES, ETC.,

- See FRUCTUS NATURALES; ESTOVERS.

GUARDIAN,

- dower assigned by, 346.
- liability of, for waste, 439.
- sale of infants' lands by, 1075.

HABENDUM CLAUSE IN DEED,

- function of, to limit grantee's estate, 1110.
- may lessen, enlarge, explain or qualify estate given in premises, 1110.

HABITABLE,

- landlord's obligation that premises be, 400.

HABITUAL DRUNKARD, DEED BY, 1076.**HALLUCINATION, EFFECT OF, ON WILL,** 1243.**HAZARD, CONTRACT OF,**

- after acquired title not transferred by estoppel in case of, 1350.
- mistake as to land sold under, 1187, 1308, 1309.

[References to sections]

HEIRLOOMS, DESCENDIBLE TO HEIRS, 17.**HEIRS,**

See HEIRS OF BODY; ISSUE;
CHILD; WORDS OF LIMITATION;
DESCENT.

action does not lie by, for waste
done by ancestor, 437.

nor for waste done in an-
cestor's time, 441.

adopted, 999.

affection for, as motive of gift,
152.

agreement between ancestor and,
to defeat statute of Descents
invalid, 991, 1165, 1315.

agreement between, to divide an-
cestor's estate, 1165, 1314, 1315.

alienage of, causes escheat when,
967.

ancient warranty binds, when,
1114, 1115, 1116.

annuity, when limited to, de-
scends to, 17, 66.

apparent and presumptive dis-
tinguished, 980.

assignment of dower by, 346.

attainder of treason or felony
corrupts blood of, 166, 167, 967.

bastard, are of half blood on part
of mother, 997.

bastard, may inherit on part of
mother, 967, 997, 998.

bastard, legitimated by marriage,
etc., 998.

See BASTARD.

born in ten month's after an-
cestor's death may inherit, 967,
980.

bound by ancestor's promise to
convey land, 1304.

bound by ancestor's promise to
devise land, 1284.

HEIRS—Continued.

by adoption, 999.

canons to ascertain, at common
law, 981-988.

catching bargains with, when
fraudulent, 1165.

collateral, as well as lineal, may
inherit, 150, 986-988, 996.

collaterals of half blood as, 967,
987, 996, 997.

collaterals of half blood take half
shares, 996, 997.

construed as "heirs of body,"
when, 184, 195.

contribution of, with widow's
dower, to pay incumbrances,
339.

corody, when limited to, de-
scendible to, 17, 66.

creditor of ancestor to subject
land in hands of, 165, 969.

and in hands of purchaser from,
when, 165.

curtesy in husbands of, who have
assigned dower to ancestor's
widow, 236.

deed by dead man's, 1109.

deed to dead grantee and his,
void, 1088.

deed to dead grantee or his, 1088.

deed to dead man's, 1109.

devise to testator's, to take as,
void, 1247.

devise to testator's, after death
of wife, gives wife life estate,
198.

donees in gift originally, 150.

dower assigned by, 346.

dower exonerated out of land in
hands of, 339.

dower in lands in hands of, be-
fore assigned out of land sold,
349.

[References to sections]

HEIRS—Continued.

dower of widows of, as against ancestor's widow, 236, 274, 275.
 dower valued in suit against, 354, 342.
 en ventre sa mere may inherit, 967, 980.
 entry by one of the, enures to all, 1038.
 entry tolled by descent upon dis-seisor's, 145, 1019.
 equity of redemption descends to mortgagor's, 602.
 escheat for want of, 13, 167, 967.
 See **ESCHEAT**.
 estates of inheritance created by use of word, 151, 152, 153, 160.
 See **WORDS OF LIMITATION**.
 estate of inheritance in reservation, 155, 160.
 estate of inheritance in use, 450.
 fee simple descendible to general, 163.
 though limited to certain class of, 163.
 female, postponed to male, when, 983, 988.
 female, take all together when, 983.
 fructus industriales descend to, when, 43.
 fructus naturales descend to, 40.
 heirlooms descendible to, 17.
 indefinite succession of, embraced by word, 152.
 lineal ancestors take as, when, 982, 992.
 lineal descendants only included originally in word, 150.
 lineal descendants take as, 982-985.
 listing land for taxation in name of dead owner's, 1359.
 money secured by mortgage does not go to mortgagee's, 640.

HEIRS—Continued.

of blood of first purchaser, 986, 994.
 of half blood, 967, 987, 996, 997.
 of infant, 994.
 of infant grantor may repudiate conveyance, 1074, 1086.
 of insane grantor may plead grantor's insanity, 1073.
 of living person are unascertained, 745, 747.
 of mortgagor liable for mortgage debt when, 641.
 of person in adverse possession may tack possessions, 1029.
 of vendor liable to specific performance, 1304.
 but cannot compel it, 1304.
 order of succession of, in Virginia, 992, 994.
 partnership land converted into personalty as against dead partner's, 21.
 personalty descendible to, 17.
 posthumous, take when, 993.
 presumptive and apparent distinguished, 980.
 presumptive divested of inheritance in favor of nearer, 980.
 primogeniture amongst, 984.
 property descending to, a hereditament, 17.
 purchaser from testator's, takes good title when, 1281.
 real fixtures descend to, 33, 36.
 See **FIXTURE**.
 redemption from tax sale by owner's, 1376.
 redemption money payable to tax purchaser's, 1377.
 release by lessor's, 1209.
 remainder to.
 See **LIMITATION**; **REMAINDER**;
 RULE IN SHELLEY'S CASE.
 rent reserved to, when it should

[References to sections]

HEIRS—Continued.

have been reserved to personal representative, and vice versa, 409.
 rent reserved to grantor and his, 83, 406, 409.
 representation among, 985, 995.
 resulting trust for testator's, 1251.
 seisin in law of, 141, 229, 231.
 shares of, 995-999.
 special occupancy created by mention of, 202, 1006, 1008.
 take per capita when, 983, 995.
 take per stirpes when, 985, 995.
 taking jointly, coparceners.
 See **COPARCENER**.
 use descendible to, 448.
 valuation of lands of, for dower, 342.
 words of limitation, 150-153, 160.
 See **WORDS OF LIMITATION**.
 words qualifying, effect of, 152.

HEIRS OF THE BODY,

See **CHILD**; **HEIRS**; **ISSUE**;
 WORDS OF LIMITATION.
 children, equivalent to, when, 154.
 descendants, equivalent to, 154.
 fee tail created by use of words, 180.
 "heirs" construed as, 184, 195.
 issue, equivalent to, when, 154.
 sons, equivalent to, when, 154.
 words of limitation, 151-153, 160, 180.
 See **WORD OF LIMITATION**.

HEREDITAMENT,

corporeal, 17, 18-64.
 See **LAND**; **BUILDING**.
 incorporeal, 17, 65-130.
 See **INCORPOREAL HEREDITAMENT**; **EASEMENT**.

HIGHWAY, 119, 120, 121.

acceptance of dedication of, 1355.
 as boundary to property.
 See **DESCRIPTION**; **NAVIGABLE WATERS**.
 dedication of, 1353.
 See **DEDICATION**.
 not within covenant against incumbrances, 1126.

HOLOGRAPH WILL, 1251, 1252, 1253.

See **WILL**.

HOTCHPOT,

advancements thrown into, 950, 952-954.
 See **ADVANCEMENT**.
 at common law, 948.
 in Virginia by statute, 949-954, 1000.

HOUSE,

See **BUILDING**.
 meaning of, 17.

HUNT, LICENSE TO, 132.**HYPOTHECATION OF GOODS**, 596.**ICE, RIGHTS IN**, 63.**IGNORANCE OF FACT OR LAW**, 1184-1188.

See **MISTAKE**.

ILLEGAL CONDITIONS, 566, 567.**ILLEGAL CONSIDERATIONS**, 1159.**ILLUSORY APPOINTMENTS**, 1320.**IMMORAL CONDITIONS**, 568.**IMMORAL CONSIDERATIONS**, 1159.

[References to sections]

IMPLIED CONDITIONS, 209-212, 371, 526.

IMPLIED ESTATE TAIL,
See **FEE TAIL.**

IMPLIED GRANT OF EASEMENT, 103, 104.

IMPLIED LIFE ESTATE, 198.

IMPLIED RESERVATION OF EASEMENT, 105, 106, 107.

IMPLIED TRUST, 467, 473-477.
See **TRUST.**

IMPOSSIBLE CONDITIONS, 547, 561, 562-565.

IMPRISONED PERSON,
as attesting witness, 1255.
period for redemption from tax sale prolonged in favor of, 1378.

IMPROVEMENTS,
accounting for, in partition suit, 962.
assignee of tenant cannot recover for, 216.
belong to owner of land when, 216.
betterment statutes, 216.
made by vendee as act of part performance, 1295.
mortgagee credited with, 621.
tenant cannot recover for, 216.

IN PARI DELICTO, ETC., 1170.

INCHOATE DOWER, 294, 295.
See **DOWER.**

INADEQUACY OF CONSIDERATION.
See **CONSIDERATION; FRAUD.**

**INCORPOREAL HEREDITA-
MENTS,**

annuities, 66.

See **ANNUITY.**

commons, 70-74.

See **COMMON; PROFIT A PRENDRE.**

corodies, 66.

See **CORODY.**

curtesy in, 231.

See **CURTESY.**

dower in, 289.

See **DOWER.**

easements, 91-130.

See **EASEMENT.**

estate for years in, 365.

franchises, 67-69.

See **FRANCHISE.**

lease of, 365.

See **LEASE; ESTATE FOR YEARS.**

occupancy of, 1007, 1008.

See **OCCUPANCY.**

profit a prendre, 70-74.

See **COMMON; PROFIT A PRENDRE.**

rent, 75-90.

See **RENT.**

cannot issue out of, 82.

reserved in reddendum clause of deed, 1112.

seisin of, 141.

seisin of, in law, when sufficient for curtesy in, 231.

title to, created by grant, 100, 142, 1201.

See **GRANT.**

title to, created by prescription, 1055, 1057.

See **PRESCRIPTION.**

INCUMBRANCES,

See **ATTACHMENT; JUDGMENT; MECHANICS LIEN; EASEMENT; MORTGAGE; DEED OF TRUST;**

[References to sections]

INCUMBRANCES—Continued.

VENDOR'S LIEN; DOWER; TACKING.

- covenant against, 1126.
- covenant against, broken as soon as made, 1131.
- covenant against, not equivalent to warranty, 1130.
- defined, 1126.
- existence of, not a breach of covenant of seisin, 1123.
- life tenant to pay principal and interest of, 217.
- notice of, by grantee, 1126.

INDENTURE,

See **DEED INDENTED.**

INDEX TO RECORDS,

- as notice to third persons, 1403.
- appearance of liens in, for proper recordation, 1393.

INFANT,

- conveyance by, 1074, 1075.
- See **CAPACITY.**
- conveyance by married woman who is, 312, 316.
- conveyance to, 1086, 1196.
- decree of foreclosure against, 635.
- decree of partition against, 965.
- devisee who is, allowed time to record will, 1281.
- disagreement of, to deed, 1196.
- dower assigned by, 346.
- exchange of lands by, 1075.
- heirs of, may repudiate conveyance by, 1074, 1086.
- inheritance from, 994.
- lease by, 1075.
- mortgage by, 1075.
- period of adverse possession prolonged in favor of, 1022, 1023.

INFANT—Continued.

- period of redemption from tax sale prolonged in favor of, 1378.
- power of sale conferred on trustee for, 1317.
- sale of lands of, 1074, 1075.
- will of, 1244.

INHERITANCE,

- See **DESCENT; HEIRS; COPARCENERS.**
- estate of, prescriptive title limited to, 1067.
- See **ESTATE OF INHERITANCE.**
- words of.
- See **WORD OF LIMITATION.**

INJUNCTION,

- to restrain waste, 442.
- to restrain wrongful use of land dedicated to public, 1355.

INSANE PERSON,

- conveyance by, 1073.
- See **CAPACITY.**
- conveyance by married woman who is, 312, 316.
- conveyance to, 1086, 1196.
- devisee who is, allowed time to record will, 1281.
- disagreement of, to deed, 1196.
- dower assigned by, 346.
- evidence that testator is, 1243.
- incompetent to attest will, 1255, 1259.
- period of adverse possession prolonged in favor of, 1022, 1023.
- period of redemption from tax sale prolonged in favor of, 1378.
- power of sale conferred on trustee for, 1317.
- will of, 1242, 1243.

[References to sections]

INSURANCE MONEY,

life tenant's right to, 216.

INTERESSE TERMINI, 360.

See ESTATE FOR YEARS; LEASE.

INTEREST.

chargeable against trustee, 501.

license coupled with an, 133, 134, 136, 137.

life tenant's duty to pay, on incumbrance, 217.

power coupled with an, 666, 1317, 1331, 1332, 1334, 1344.

See POWER.

power of attorney coupled with an, 1105.

INTERLINEATION, 1190-1192.

See ALTERATION.

INTERLOCK,

adverse possession of, 1041-1048.

See ADVERSE POSSESSION.

INTOXICATION OF GRANTOR IN A DEED, 1076.**INVESTMENT OF PROPERTY BY TRUSTEE, 504, 505.****IRRIGATION, 55.****ISLAND, TITLE TO NEWLY FORMED, 1015.****ISSUE.**

as word of limitation to create fee tail, 154, 181, 182.

before birth of, husband's estate in wife's land, 243.

curtesy initiate after, 243, 241.

curtesy requires birth of, alive during coverture, 242.

dower does not require birth of, 278.

equivalent in will to "heirs of body," 154.

ISSUE—Continued.

for curtesy or dower, must be capable of inheriting as heirs of wife, 238, 278.

need not be the only heirs of wife, 242.

lapsed devise goes to dead devisee's, when, 1279.

legitimation of, affects curtesy, 242.

will revoked by birth of, when, 1272-1274.

word of purchase in deed, 154.

JOINDER,

See DEED; DOWER.

of grantors in granting part of deed, 1081, 1109.

of infant or insane wife, 316.

of wife in husband's contract to convey, 317.

specific performance of, 318.

of wife in husband's conveyance, 313-318, 1081.

of wife in husband's deed of trust or mortgage, 315.

does not make her his surety, 295.

effect of, 285-287, 340.

of wife in husband's power of attorney, 317.

of wife in husband's void conveyance, 314.

of wife releases dower, but passes nothing, 295.

JOINT DONEES, EXERCISE OF POWER BY, 1332.

See POWER.

JOINT EXECUTORS,

acts of, may be several, 509.

power in, exercisable severally, 1332.

survivorship upon death of one of, 893, 1332.

[References to sections]

JOINT TENANCY,

See **JOINT TENANT**.
 estate by entireties in premises
 may become husband's alone
 in habendum, 1110.
 See **ESTATE BY ENTIRETIES**.
 existence of, as breach of cov-
 enant of seisin, 1123.
 grantee named in habendum, in
 addition to another grantee in
 premises does not create,
 1110.
 in fee in premises, reduced by
 habendum to life estate in one
 with remainder to other, 1110.
 nature of, 878.

JOINT TENANTS,

accountable for profits, 891.
 action by or against, must be
 joint, 890.
 advantages of dissolving jointure,
 905.
 adverse possession not pre-
 vented by disabilities of one
 of, 1022.
 adverse possession of one,
 against another, 1039.
 cannot transfer or charge estates
 of cotenants, 889.
 compulsory partition between,
 904, 956-965.
 See **PARTITION**.
 convey to each other by release,
 or by deed, 888, 1208.
 conveyance of, by metes and
 bounds, 889.
 curtesy in land of, 230, 233.
 deed necessary for voluntary
 partition between, 901, 902.
 dower assigned by, 346.
 dower assigned to widow of one
 of, 350.
 dower in land of, 270, 299.

JOINT TENANTS—Continued.

easement not extinguished by
 union of dominant and serv-
 ient tracts in case of, 115.
 effect of voluntary partition, 903.
 entry by, 887.
 estate of, must be same, 882.
 must vest at same time, 883.
 exchange by, 1202.
 incidents of, 885-893.
 interest of, must be same, 882.
 lapse of devise to, on death of
 one of, in testator's life time,
 1278, 1279.
 lease by, reserving rent, 886.
 livery of seisin to, 887.
 modes of creating, 879.
 modes of terminating relation of,
 894-904.
 must be created by same act,
 881.
 must claim under same convey-
 ance, 883.
 must not defeat or injure coten-
 ant's estate, 889.
 nature of, 878.
 notice to, 887.
 owners of surface and of min-
 erals below surface not, 19.
 partition between, 900-904, 955-
 965, 1203.
 See **PARTITION**.
 partition between, not compel-
 lable at common law, 900, 956.
 possession of, 884, 887.
 purchasers at tax sales, 1369.
 purchasing outstanding claims
 against cotenants, construct-
 ive trustees, 481.
 redemption by, of land sold for
 taxes, 1376.
 rent reserved to, 405, 409, 886.
 seised of whole jointly and of
 nothing separately, 884, 889.

[References to sections]

JOINT TENANTS—Continued.

- surrender to, 887.
- survivorship between, 233, 270, 299, 892, 893, 1278, 1279.
- trust and confidence of, in each other, 887.
- unity of estate or interest, 882, 897, 898.
- unity of possession, 884, 900-903, 904.
- See PARTITION.
- unity of time, 883, 899.
- unity of title, 881, 895, 896.
- voluntary partition of estate of, 900-903.
- See PARTITION.
- waste by, 439, 441, 891.

JOINT TRUSTEES,

- acts of, should usually be joint, 509.
- power in, exercisable severally, 1332.
- survivorship upon death of one of, 1332.

JOINTURE,

- See JOINT TENANTS; DOWER.
- advantages of, over dower, 328.
- depreciation in value of, 327.
- election between dower and, 225, 326.
- equitable, 322.
- law determining what is a, 324.
- loss of, 327.
- origin of, as bar to dower, 320.
- requisites for, under English statute, 321.
- requisites for, in Virginia, 323.

JUDGMENT FOR LAND,

- against husband, effect of, upon dower, 266.
- in case of dower, equivalent to assignment of dower, 275.
- recording of, 1390, 1392.

2 Min. Real Pro p—46

JUDGMENT, LIEN OF,

- a legal lien, 697.
- a statutory lien, 690.
- against grantor in exchange, extends to both tracts, 1404.
- against vendee, priority of, over vendee's assignee, 474.
- alienation of land subject to, by simultaneous transfers, 706.
- alienation of land subject to, in successive parcels, 703-705.
- alienation occurs at date of deed, not at time of registry, 704.
- assignment of, by judgment creditor, 702.
- assignment of land subject to, 703-706.
- commencement of, 694-696.
- contingent remainder subject to, when, 693.
- creditor secured by, can subject only debtor's interest, 693.
- has no priority over defective first mortgage, 636.
- not a purchaser, 595.
- decree also covered by, 692.
- discharge of, 708.
- docketing of, 700, 701.
- See RECORDATION; REGISTRY.
- duration of, 697.
- enforcement of, in equity, 165, 699.
- how and when barred, 699.
- equitable title subject to, 693, 487.
- equity of redemption subject to, 693.
- indexing of, necessary to due recording of, 1403.
- judgment by default, 695.
- judgment confessed, 696.
- land itself, not merely the money invested therein, bound by, 693.
- lapsed devise, as subject to, 693.
- merger of, 693.

[References to sections]

JUDGMENT, LIEN OF—Continued.

not binding upon debtor's land,
if obtained against debtor's
personal representative, 693.

not binding upon land held by
debtor in trust, 693.

not binding upon perfected equi-
table title in hands of pur-
chaser, 693.

origin of, in writ of elegit, 692.

priorities between creditors se-
cured by, 1416.

between creditors secured by,
and grantee in unrecorded
deed, 1407, 1418.

between debtor's alienees for
value and volunteers, 705.

See **PRIORITY**.

property subject to, 693.

recordation of, 700, 701, 1390,
1391, 1392, 1393, 1394, 1405.

recordation of federal, 701.

relates back to first day of term,
when, 694.

release of, 698, 708.

rents and profits to satisfy, 699.

revival of, by scire facias or ac-
tion, 697.

sale of land to satisfy, 699.

satisfaction of, 708.

subrogation of sureties to, 707.

surplus after sale under deed of
trust subject to, 693.

tacking of, to incumbrance, 657.

tenant of land sold under, en-
titled to emblements, 50.

upon land held under contract
of sale, 693.

waiver of, 698.

JUDICIAL ACT,

admission of deed to record not
a, 1393.

JUDICIAL ACT—Continued.

taking of acknowledgment a,
1393, 1398.

JUDICIAL SALE,

buyer at, made for creditor's
benefit, not a purchaser, when,
1171, 1172, 1404.

commissioner to execute deed,
965.

commissioner to make, 635, 962,
963.

not within statute of Frauds,
1300.

See **STATUTE OF FRAUDS**.

JUS ACCRESCENDI,

See **SURVIVORSHIP**.

JUS DISPONENDI,

See **ALIENATION**.

in first taker avoids subsequent
executory limitation, 858.

in life tenant creates fee simple,
when, 162.

JUSTICE OF PEACE,

acknowledgment before, 1397.

no jurisdiction of freehold
rent, 79.

**KNIGHT-SERVICE, TENURE
BY, 6, 14.****LABOR LIEN, 729.****LACHES, IN ENFORCING
VENDOR'S LIEN, 687.****LAKE, DESCRIPTION OF, IN
DEED, 19.****LAND, ABOVE AND BELOW
SURFACE OF, 17, 19.**

buildings upon, part of, 23.

See **BUILDING**.

[References to sections]

- LAND, ABOVE AND BELOW SURFACE OF**—Continued.
 corporation's, stockholders' interest in, 22.
 corporeal property only embraced in, 17.
- LAND,**
 curtilage, 17.
 equitable conversion, 20, 21.
 See **EQUITABLE CONVERSION**.
 fixtures, 24-38.
 See **FIXTURES**.
 fructus industriales, 39, 43-50.
 See **EMBLEMENTS; FRUCTUS INDUSTRIALES**.
 fructus naturales, 39-42.
 See **ESTOVERS; FRUCTUS NATURALES**.
 gas, 64.
 house, 17.
 ice, 63.
 license not an interest in, 132, 134.
 light from above surface of, 19.
 limb of tree overhanging, 19.
 messuage, 17.
 minerals and mines, 51.
 See **MINERALS; MINE**.
 oil, 64.
 ownership of surface of, and of things below, separable, 19.
 partnership, 21.
 See **PARTNERSHIP LAND**.
 party wall on another's, 125.
 prescriptive title to, arises when, 1055, 1057.
 single story or apartment, 23.
 telegraph, etc., wires over, 19.
 title to,
 See **TITLE**.
 water and water rights, 52-63.
 See **WATER RIGHTS**.
- LANDLORD AND TENANT,**
 See **LEASE; ESTATES**.
- LANDLORD AND TENANT**—Continued.
 adverse possession as between, 1033, 1039.
 concealed defect in leased building, 394.
 covenants in lease, 412-418, 421-424.
 See **COVENANT; LEASE**.
 cutting down of undergrowth by tenant, 41, 429.
 desertion of premises by tenant, 526.
 emblements, 44-50.
 See **EMBLEMENTS**.
 entry upon tenant by sufferance, 387.
 estoppel of tenant to deny landlord's title, 402.
 estovers, 41.
 See **ESTOVERS**.
 eviction of tenant, 403, 412, 419.
 forcible entry upon tenant by sufferance, 388.
 forfeiture of lease for non payment of rent, 526.
 for desertion of premises, 526.
 equitable relief against, 539.
 fraud as affecting tenant's estoppel to deny title, 402.
 habitable premises, 400.
 mines on premises when workable, 290, 431.
 See **MINE**.
 mistake as affecting tenant's estoppel to deny title, 402.
 nuisance on leased premises, 394.
 obligations of lessee to strangers, 395-398.
 obligations of lessor to strangers, 394.
 occupancy of premises by tenant, after end of lease and before harvest, 44.

[References to sections]

LANDLORD AND TENANT—

Continued.

possession of tenant protected by lessor, 403, 414.

possession of tenant constructive notice to purchaser, 1413.
rent, 404-412, 415, 419.

See RENT.

repairs, 401, 416, 426, 433.

surrender, as affecting tenant's estoppel to deny lessor's title, 402.

use of premises by tenant, 590, 1349.

waste, 401, 416, 425-444.

See WASTE.

LAPSED DEVISE,as subject to judgment lien, 693.
effect of, upon residuary clause, 1280.

in case of devise in exercise of power, 1333.

in case of devise to tenants in common, 1278.

in case of devise to joint devisees, 1278, 1279.

nature of, 1278.

Virginia statute curing, 1088, 1279.

void. 1088, 1278-1280.

LEASE,

a common law conveyance, 1200.

acceptance of new, implies surrender of old, 1218.

after acquired title by estoppel under, 1349.

assignment distinguished from, 1200, 1224.

assignment of,

See ASSIGNMENT; COVENANT; CONDITION.

beginning "from" such a date construed, 367.

LEASE—Continued.

by joint tenants, 886.

condition clause in, 1113.

See CONDITION.

condition in, destroyed by surrender, 1219.

confirmation of estate under, 1074, 1220, 1221.

contract to, 363, 369, 1200.

contract to, distinguished from present or future, 368, 369.

conveyance under mere power to, not a, 1200.

covenant already broken not destroyed by surrender, 1219.

covenant for, re-entry, 418.

for rent, 412, 415.

not to assign, 417.

not to commit waste, 444.

of renewal, 359.

of title, 403, 414, 1121

running with land, 421-423.

See COVENANT.

running with reversion, 424.

to repair, 416.

creates estate at will, for life or for years, 359, 362, 369, 1178, 1200.

creates estate from year to year, when.

See ESTATE FROM YEAR TO YEAR.
date of, 367.

deed when necessary to create a, 1099-1101, 1200.

See DEED; STATUTE OF FRAUDS.

delivery of, 367.

distinguished from contract to, 368, 369.

distinguished from "letting of lodgings," 365, 366.

dowress cannot enter for breach of condition in husband's, 355.

future, 368, 369.

gas, 64, 431.

[References to sections]

LEASE—Continued.

- index of, in record books as notice, 1403.
- invalid under statute of Frauds may create estate at will or from year to year, 378, 390.
- local custom cannot be shown to vary written, 47.
- mining, 431, 64.
- of apartments, 365, 366.
- of estate at will, 377.
- See ESTATE AT WILL.
- of infants' lands, 1074, 1075.
- oil, 64, 431.
- operating by estoppel, 364, 1349.
- option of one party to terminate, 379.
- parol, 362, 363, 369.
- may be altered by proof of local custom, 47.
- power of life tenant to make, extinguished by assignment of life estate, 1344.
- See POWER.
- reddendum clause in, 1112.
- registry of, 1390, 1391, 1392, 1405.
- registry of contract to, 1390, 1391, 1392.
- renewal of, by trustee in his own name, 480.
- reversion in grantor essential to, 1200.
- surrender of possession under, 402, 1212-1219.
- See SURRENDER.
- tenant from year to year holds under terms of expired, or invalid, 390.
- writing required for contract to, when, 369, 1100, 1101.

LEASE AND RELEASE,

- conveyance by, at common law, 1234.

LEASE AND RELEASE—Continued.

- conveyance by, under statute of Uses, 455, 456, 466, 1234.

LEASEHOLD,

- See ESTATE FOR YEARS; LANDLORD AND TENANT; LEASE.

LETTER, TAKING EFFECT AS A WILL, 1251.**LEVY OF TAX, 1358, 1359, 1386.****LEX DOMICILII CONTROLS INTENT TO CREATE JOINTURE, WHEN, 324.****LEX SITUS OF LAND CONTROLS CONVEYANCE, ETC., 1070.****LICENSE,**

- assignability of, 135.
- confers a personal trust or confidence, 132.
- unless coupled with an interest, 133, 134, 136, 137.
- coupled with an interest, 133, 134, 136, 137.
- dedication, until accepted, a mere, 1355.
- distinguished from easement, 97, 1286.
- distinguished from sale of interest in land, 97, 1286.
- easement granted by parol construed as a, 100.
- easement granted in form of, 100.
- easement obstructed by dominant owner's, is extinguished, 116.
- executed and executory, 133.
- express, 132.
- implied, where express grant otherwise nugatory, 132.

[References to sections]

LICENSE—Continued.

- implied from a grant of profit a prendre, 70.
- implied in favor of grantee of way to enter to repair way, 121.
- in favor of purchaser of growing timber, 42.
- in favor of tenant entitled to emblements, 44.
- irrevocable, when, 137.
- may be oral, 134.
- nature of, 132.
- negligence in exercise of, 132.
- not an interest in land, 97, 134.
- rebutts prescriptive user, 1065, 1066.
- revocation of, 136, 137.
- tenant's liability for injury to one entering under, 397.
- to attach fixtures to another's land, 27.
- to do acts on another's land, 132.
- to do acts on one's own land, 132.
- to mine, distinguished from conveyance of minerals in place, 51.

LIEN.

See CREDITORS; PRIORITY; MORTGAGE.

attachment, 710.

See ATTACHMENT.

covenant of seisin does not protect against, 1123.

covenant against incumbrances embraces, 1126.

courtesy in surplus after satisfying, 239.

distinguished from mortgage or deed of trust, 679.

dower in land subject to, 269, 339, 340.

LIEN—Continued.

dower in surplus after satisfying, 285-287.

dowress to contribute to pay off, 355.

emblements for tenant of land sold under, 50.

See EMBLEMENTS.

equitable, 595, 680-689.

judgment, 692-708.

See JUDGMENT.

labor, 729.

life tenant's duty to pay principal and interest of, 217.

lis pendens, 711.

See LIS PENDENS.

mechanics', 712-728.

See MECHANICS' LIEN.

of forthcoming bond forfeited, 709.

rent granted as a, 84.

See RENT.

reservation of title in vendor as a, 688.

statutory, 595, 680, 690-729

supply, 729.

tax, 1357.

See TAX SALE.

tax purchaser takes free from all, 1385.

vendee's, for purchase money paid, 689, 1409.

vendor's, for unpaid purchase money, 680-688.

See VENDORS' LIEN.

LIFE ESTATE,

a freehold, 196.

apportionment of rent in case of sublease by tenant of, 221.

See RENT.

commuted value of, 218.

condition restraining alienation annexed to, 588.

[References to sections]

LIFE ESTATE—Continued.

created by act of law, 197.
 created by act of parties, 198.
 created by exception, 199.
 created by implication in wills, 198.
 created by reservation, 199.
 created by will or conveyance without words of inheritance when, 151, 154, 160, 180, 198.
 curtesy a, 196.
 See **CURTESY**.
 defense of title by tenant of, 220.
 dower a, 196.
 See **DOWER**.
 emblements, 206.
 See **EMBLEMENTS**.
 estate tail after possibility of issue extinct a, 192, 196.
 estovers, 207.
 See **ESTOVERS**.
 fixtures removable by tenant of, when, 214.
 for life of another, 201-203.
 doctrine of occupancy, 202, 203.
 See **OCCUPANCY**.
 for tenant's own life, 200.
 greater than estate for another's life, 200, 215.
 forfeiture for breach of implied condition, 209-212.
 granted to assignee of land subject to mortgage, 651.
 implied conditions annexed to, 210-212, 371, 526.
 improvements by tenant of, 216.
 in chattel, 357.
 in estate for years, 357.
 in habendum following fee in premises, 1110.
 in incorporeal property, 198.
 in rents, 88, 89.

LIFE ESTATE—Continued.

incidents of, 205.
 incumbrances to be paid by tenant of, 217, 651.
 insurance money goes to tenant of, when, 216.
 livery of seisin to create, at common law, 196, 198.
 merger of, 215.
 See **MERGER**.
 no curtesy nor dower in, 236, 273.
 power conferred on unborn tenant of, void, 1326.
 power in tenant of, to make long leases, 1324.
 See **POWER**.
 power of alienation attached to, 162, 208, 858, 1328.
 raised by implication to fee tail, 182, 183.
 repairs by, 216.
 second delivery of deed by tenant of, after he has acquired fee, 1143.
 taxes to be paid by tenant of, 219.
 waste complained of by tenant of, when, 441, 443.
 waste renders tenant of, liable, 213, 437-439.
 See **WASTE**.

LIGHT, EASEMENT OF,

 See **EASEMENT**.
 arises by estoppel when, 109.
 arises by express grant, 127.
 arises not by implied grant or reservation, 104, 127.
 arises not by prescription, 104, 127, 1066.
 arises not by natural right, 127.
 extinguishment of, 116.

[References to sections]

LIMITATION,

common law, or special, 540,
574, 586, 589.

See SPECIAL LIMITATION.

conditional,

See CONDITIONAL LIMITATION;
EXECUTORY LIMITATION.

words of,

See WORDS OF LIMITATION.

**LIMITATION BY WAY OF RE-
MAINDER OR EXECUTORY
LIMITATION,**

to Z for ten years, then to W for
life, and after W's death to X
in fee, 732.

to Z for twenty years, then to
W for eighty years, 732.

to A for ninety-nine years, re-
mainder to Z for one year,
734.

to A for three years, remainder
to B in fee, 734.

to A for life, remainder to Z in
fee, 736.

to A for life, remainder after C's
death to Z in fee, 736, 740, 745,
780, 822.

to A for life, and after one year
from A's death to Z in fee, 736,
822.

to A for life, remainder to Z's
eldest son (unborn) in fee, 736.

to A and his heirs, remainder to
B and his heirs, 737.

to A and his heirs as long as
Z has heirs, remainder to B
and his heirs, 737.

to A for life, remainder to Z's
heirs, and if A die, living Z, to
W and his heirs, 737.

to A for life, remainder to Z for
life, 739.

to D for life, and at her death

**LIMITATION BY WAY OF RE-
MAINDER OR EXECUTORY
LIMITATION—Continued.**

to be equally divided among
her children, should any sur-
vive her, 740.

to X and Z for life, remainder
to the survivor, 740, 745, 747.

to A until he marries Y, then at
once to Z, 740.

to A until Z returns from
abroad, then to W in fee, 742,
795.

to A for life, and if Z die before
X, remainder to W, 742.

to A for life, remainder to B if
he live to reach twenty-one,
and if he fail to reach twenty-
one, then to C, 743.

to A for life, remainder to B, C,
and D (testator's children),
and if any of these die before
A, his share to go to the sur-
vivors, 743.

to A for life, remainder to tes-
tator's surviving children, 743.

to A for life, remainder to A's
surviving children, 743, 747.

to A for life, remainder to B in
fee, but if B die during A's
lifetime, B's estate to go to
his children, 743.

to A for life, and 'on' (or 'at,'
or 'from,' or 'in the event of')
A's death, to B, 744.

to A until B reaches twenty-one,
and when B reaches twenty-
one then to B and his heirs,
744.

to A for twenty years if he shall
so long live, and after his
death to Z in fee, 745, 745.

to A for life of B, remainder to
B's heirs, 745.

[References to sections]

LIMITATION BY WAY OF REMAINDER OR EXECUTORY LIMITATION—Continued.

- to A for life, remainder to A's heirs, 745, 752.
- to L for life, remainder in fee to children of L, living at L's death, 745, 747.
- to A for one hundred years if he shall so long live, and after A's death to W in fee, 746.
- to A for life, remainder to such of his children as reach twenty-one, 747.
- to A for life, remainder to A's unborn son or child, 747, 780.
- to A for life, remainder to his eldest son (unborn) 747.
- to A for life, remainder to his eldest son living at A's death (A having no son at time), 747.
- to A for life, remainder to B's heirs (or heirs of the body or issue, etc.), 747, 756, 796.
- to D for life, and at her death to be equally divided among her children, should any survive her; if she die without issue, or if her surviving child or children should die before becoming of age, then to be divided among testator's heirs at law according to laws of Virginia, 747, 798.
- to A for life, remainder to A's children, 182, 749, 780.
- to A for life, remainder to B's children (or heirs, or brothers, or any designated class of persons), 749, 780.
- to A and his children, 183.
- to A's eldest son (unborn) for

LIMITATION BY WAY OF REMAINDER OR EXECUTORY LIMITATION—Continued.

- life, remainder to his children, 182.
- to A for the support of herself and her children, 183.
- to A for life, remainder to heirs of grantor, 750.
- to A for life, remainder to the now living heirs of W, 751.
- to A for life, remainder to heirs of A and B, 756.
- to A for life, remainder to heirs of body of A and his wife, 756.
- to A for life, remainder to heirs of A's body, living at his death or born within ten months thereafter, 758, 871.
- to A for life, remainder to heirs of A who shall then have reached twenty-one, 758.
- to A for life, remainder to sons of A and their heirs, 758.
- to A for life, remainder to heirs of A and the heirs male of the body of such heirs, 758, 771.
- to A for life, remainder to such persons as shall at A's death answer the description of A's heirs, 758.
- to A and B during their joint lives, remainder to Z for life, remainder to A's heirs, 765.
- to A and B during their joint lives, remainder to Z for life, remainder to heirs of A and B, 766.
- to A and B for their joint lives, remainder to heirs of B (or to heirs of survivor), 767.
- to A for life, remainder to B

[References to sections]

LIMITATION BY WAY OF REMAINDER OR EXECUTORY LIMITATION—Continued.

- for life, remainder to heirs of A and B, 768.
- to A for life, remainder to Z for life if he should survive W, remainder to A's heirs, 769.
- to A for life, remainder to B for life, remainder to A's heirs, 769.
- to A for life, and if A survive B, remainder to A's heirs, 770.
- to A for life, and then to heirs of his body, share and share alike, as tenants in common, 772.
- to A and B during their lives and no longer, and then to be equally divided between their heirs lawfully begotten, 772.
- to A for life, and after her death to the lawful issue of her body, to them and their assigns forever, 772.
- to A for life only, and after A's death to such persons as shall at that time answer the description of heir or heirs at law of A, 772.
- to A for life after death of Z (testator's heir), remainder to W for life, remainder to Z's heirs, 773.
- A covenants to stand seised to use of heirs male of his body, 773.
- to use of A for life, and after his death to such uses as Z shall appoint (Z appointing to heirs of A), 774.
- to A and B for life, as tenants in common, remainder to heirs

LIMITATION BY WAY OF REMAINDER OR EXECUTORY LIMITATION—Continued.

- of Z (A dying in Z's lifetime), 780.
- to A for life, remainder to unborn children of, Z, 780.
- to A for life, remainder to B if he survive C, 780, 822.
- to A for life, remainder after Z's death to B for life, remainder to W in fee (A buying W's remainder), 780.
- to A for life, remainder to B in fee (A being incapable of taking), 783.
- to A for life, remainder to C for life, remainder to X in fee (C dying during life of A and X), 783.
- to A for life, remainder if B survive C to B for life, remainder to D in fee (B dying before C), 783.
- to A for life, and if he have a son to such son in fee, and if he have no son to B in fee, 784.
- to A, B and C for their lives, remainder to survivors or survivor, 785.
- "to my two sons, one part to one and his heirs, and the other part to the other and his heirs; I will that the survivor of them^{*} shall be heir to the other, if either die without issue." 787.
- "to my two daughters and their heirs, equally to be divided between them, and if they die without issue, I give all to my nephew," 787.
- to A and B as tenants in com-

[References to sections]

LIMITATION BY WAY OF REMAINDER OR EXECUTORY LIMITATION—Continued.

- mon in tail, and if both die without issue to Z in fee, 788.
- to A and B as tenants in common in fee simple, but if both die without issue (or under thirty) to Z in fee, 788.
- to A for life, remainder to his unborn child for life, remainder to eldest son (or issue, etc.) of such unborn child, 182, 791, 792.
- to A for life, remainder to first unborn son of A who shall reach forty-five, 792.
- to A for life, remainder to her (unbegotten) bastard child, 793.
- to A for life, and if Z return from abroad remainder at once to W's unborn son (or to W in fee), 795.
- to A for life, and if Z marry W, then remainder to B, 795.
- to A for life, remainder to A's first and other sons in tail, remainder to B for life, remainder to B's first and other sons in tail, 797.
- to use of feoffor for life, remainders to use of feoffees for eighty years if N. S. and E. S., his wife, so long live, and if E. S. survives N. S., then to her for life, and after her death to B. S. in tail, and in default of issue, to E. N., D. S. and F. S. and the heirs of their bodies, remainder to heirs of feoffor, 797.
- to A for life, remainder to her issue male and his heirs for-

LIMITATION BY WAY OF REMAINDER OR EXECUTORY LIMITATION—Continued.

- ever, and if she die without issue male, remainder to B in fee, 798.
- to A for life, with power to appoint in fee, and in default of appointment to B in fee, 798.
- to A (testator's son) for life, remainder to A's first and other sons by any future wife in tail, provided that if A should afterwards marry any one akin to his present wife, M, the foregoing limitations to the issue of such future marriage to cease, and the land to pass to testator's nephews, 799.
- to my sisters, E and M, until the death of the husband of my sister S, and in case S should then be living, to my three sisters severally for their lives, remainder severally to their first and other sons in tail, remainder over (S dying in husband's lifetime), 799.
- to trustees for eleven years, remainder to first and other sons (unborn) of B in tail, provided they take my surname, if not or should they die without issue, remainder to first son of C, remainder over (B never having a son, and C having a son at time of devise), 800.
- to my wife for life, upon this express condition only, that if she marry again the property to go forthwith to my eldest son in tail, remainder over

[References to sections]

LIMITATION BY WAY OF RE-MAINDER OR EXECUTORY LIMITATION—Continued.

- (the wife dying without marrying again), 801.
- to A for life, and after his death to such of his children as shall become twenty-one, 822.
- to A for life, remainder to such of A's children as become twenty-one after A's death, 822.
- to A for ten years, remainder to heirs of B, 822.
- to A for life, remainder to first and other sons of A in tail, remainder to future sons of B for life (A dying before testator without issue, and B having no sons at testator's death, but having some later), 822.
- to the heirs of A (who is yet living), 824.
- to the unborn son of A, 824.
- to A for life (or in fee) to commence five years from date, 824.
- to the surviving children of A after death of B, 825.
- to A's children (or brothers, or nephews, or any other designated class of persons), 826.
- to the heirs (or heirs of the body, or issue, or unborn child, etc.) of B (a living person), 827.
- to A upon the marriage of B, 827.
- to such of A's children as shall reach twenty-one, 827.
- to A and his heirs, but if A die under twenty-five (or if B die leaving no issue at his death,

LIMITATION BY WAY OF RE-MAINDER OR EXECUTORY LIMITATION—Continued.

- or if A marry W, etc.), to Z and his heirs, 828, 829.
- to A for life, and if A marry W, then to B in fee, 828.
- to A for life, and if A marry W, then at once to B in fee, 828.
- to A's eldest son (unborn) in fee, but if he die under thirty to B in fee, 829.
- to the child of which my wife is enceinte, and if such child die under twenty-one, then over (the wife not being pregnant), 838.
- to A in fee, but if he die under twenty-five to B in fee (A never coming into existence or dying under twenty-five and before testator), 838.
- to A in fee, but if B marry C, then to B for life (B marrying C), 839.
- to A's eldest son (unborn) in fee, but if A have no son, to B in fee at A's death, 840.
- to A in fee, but if A die leaving issue at his death, then to such issue, if he die leaving no issue at his death then to B in fee, 840.
- to A for life, remainder to his issue, and if he have no issue or if, in case he have issue, such issue die under twenty-one, then over to B, 840.
- to A, B and C in fee, and if they die without issue to Z in fee, 841.
- to a grandson (unborn) of testator who shall reach twenty-one, 846.

[References to sections]

LIMITATION BY WAY OF REMAINDER OR EXECUTORY LIMITATION—Continued.

- to such children of A (living) as may be living at a certain period (too remote), 847.
- to H and W during their joint lives, remainder to survivor for life, remainder to first and other sons in tail, remainder to daughters in tail, remainder to heirs of H, 849.
- to A in fee after a total failure of the heirs male of B's body, 850.
- to such children of A, after A's death, as reach twenty-five (A dying before testator), 850.
- to A in fee, but if he shall leave no son who shall reach twenty-five, to B in fee, 852.
- to A in fee, but if he leaves no son, or if he leaves no son over twenty-five, to B in fee, 852.
- to such of A's sons as shall take holy orders, 853.
- to first son of A who reaches twenty-five, 853.
- to first son of A who reaches twenty-one, 853.
- to such of my grandchildren as reach twenty-one, 853.
- to such of my grandchildren as shall reach twenty-two, 853.
- to A in fee, but upon failure of A's heirs, to B in fee, 851, 854.
- to A in fee, but upon failure of A's heirs, etc., at his death, to B in fee, 855.
- to A in fee, but if A die without heirs, etc., to B in fee, 856.
- to A in fee, but if he die without

LIMITATION BY WAY OF REMAINDER OR EXECUTORY LIMITATION—Continued.

- heirs, etc., living at his death, to B in fee, 856.
- to A and the heirs of his body, and if he die leaving no heirs of the body then living, so much as A shall be possessed of at his death to B, 858.
- to A for life, with power to sell or use at A's discretion and what remains undisposed of at A's death to B, 858.
- to A for life, and what remains undisposed of by A to go to B at A's death, 162, 858.
- to A and his heirs, and if A should not leave issue living at his death, to B for life, remainder to C in fee, 859.
- to A for life after the death of B, remainder after A's death to C in fee, 859.
- to A in fee in trust until B reaches twenty-one; and if B should reach twenty-one or have issue, then to B and the heirs of his body; but if B die before twenty-one or without issue, remainder to S, 859.
- to A for life, and after his death to my children in tail, and in default of my issue, to J. H. in fee (testatrix leaving an infant daughter who soon died), 859.
- to A and his heirs, and if he die without a son living at his death, then in fee to first son of B who reaches twenty-one, and if he has no son, then in fee to his first daughter who

[References to sections]

LIMITATION BY WAY OF REMAINDER OR EXECUTORY LIMITATION—Continued.

- reaches twenty-one, if no daughter to C in fee, 860.
- to A in fee to commence six months after my death, 863.
- to A for life, remainder to A's sons for life, remainder to (unborn) sons of C, 863.
- to trustees in trust to cause the income to be accumulated during the lives of all my sons and of all my grandsons living at my death or then en ventre sa mere, then to be divided, etc., 866.
- to A for life, and if he die without issue to B, 182, 868-872.
- to A for life, and if he die without issue to B and his heirs, 873.
- to A and his heirs, but if he die without lawful heirs, to B (A's relative) and his heirs, 874.

LIMITATIONS, STATUTE OF.
See ADVERSE POSSESSION; STATUTE OF LIMITATIONS.**LINEAL DESCENDANTS, AS HEIRS,**

See DESCENT; HEIRS.

LINEAL WARRANTY, 1114, 1115, 1116.

See WARRANTY.

LIQUIDATED DAMAGES, NOT A PENALTY, 594.**LIS PENDENS,**

- index of, as necessary to recordation of, 1393, 1403.
- lien of, 711.
- recordation of, as against creditors, 700, 1390, 1405.

LIS PENDENS—Continued.

- recordation of, as against purchasers, 711, 1390, 1391, 1392, 1393, 1403.

LISTING OF LAND FOR TAXATION, 1358, 1359, 1386, 1387.**LITERARY PURPOSES, DEPOSE FOR, VALID,** 1246.**LIVERY OF SEISIN,**

- assignment of freehold requires, 1223.
- confirmation by way of enlargement requires no, 1222.
- continual claim abolished, 144.
- constructive, under statutes of Uses and Wills, 142, 1101, 1230.
- contrasted with grant, 142, 1230.
- dispensed with under statutes of grants, 1201, 1230.
- exchange requires no, 1202.
- freehold transferred by, 142, 1198, 1201.
- grant now takes place of, 142, 1101, 1201.
- in deed and in law, 144.
- lease of freehold requires, 142.
- nature of, 142, 143, 144.
- origin of, 4, 143.
- partition of freehold between tenants in common requires, 1203.
- release enlarging estate requires no, 1209.
- release passing a right requires no, 1207.
- surrender requires no, 1216.
- to one joint tenant enures to all, 887.
- to particular tenant in case of freehold remainder, 734.
- uses transferred without, 448, 449.

[References to sections]

LODGING CONTRACTED WITH ESTATE FOR YEARS,
365, 366.

LOST DEED,

deed made by decree of court
evidence of title passed under,
1102.

establishment of, in equity, 1102.

LOW WATER MARK, AS BOUNDARY LINE, 58, 60.

LUNATIC,

See **INSANE PERSON.**

MAINTENANCE,

choses in action unassignable at
common law for fear of, 642.

right of re-entry not reserved
to stranger because of danger
of, 534.

trusts of, 484.

MANDAMUS,

to compel admission of deed to
record, 1393.

to compel execution of tax deed,
1374, 1381.

MANIA, EFFECT OF, ON WILL, 1243.

MANSION HOUSE,

meaning of, 17.

right of widow to, by virtue of
quarantine, 338.

MANURE, AS PART OF REALTY, 33.

MAP,

dedication by, showing streets,
etc., 1354.

description of land by reference
to, 1150.

MAP—Continued.

estoppel to prevent vendee's use
of streets, etc., appearing on,
109, 1354.

recording of, 1150.

MARRIAGE,

a valuable consideration as
against all persons but exist-
ing creditors, 1181, 1408.

brocage contracts, 571.

conditions in restraint of, 570-
577.

considerations in restraint of,
1159.

conveyance in consideration of,
1157, 1172, 1179.

conveyance as reward for secur-
ing, 571, 1166.

curtesy requires a, 226, 227, 228.

divorce from, affects curtesy and
dower, 227, 264, 305.

dower requires a, 264.

incident of feudal tenure, 11.

legitimation by subsequent, af-
fects descent, 998.

affects curtesy, 242.

limitation until, 574.

registry of contracts in consider-
ation of, 1390, 1391, 1392.

settlement, as means of preserv-
ing entail, 190.

as origin of jointure, 320.

as origin of rule against per-
petuities, 849.

will revoked by testator's, when,
1264, 1271.

MARRIED WOMAN,

after acquired title does not pass
by estoppel in case of, 1133,
1350.

as grantee in conveyance, 1086.

certificate of acknowledgment
of, 309, 311, 312, 1399.

[References to sections]

MARRIED WOMAN—Continued.

common recovery to convey land of, 1079, 308.

contract of, wanting in mutuality, 1304.

See **MUTUALITY**.

conveyance by, at common law, 308, 1078, 1079.

conveyance by, in Virginia, 309-312, 1081, 1082.

conveyance by, to husband, 331.

conveyance disagreed to by, 1196.

conveyance of equitable separate estate of, 309, 311, 312, 1080, 1081.

conveyance of statutory separate estate of, 309, 310, 311, 1082.

criterion to determine if estate of, be equitable or statutory separate estate, 1082.

curtesy in lands of.

See **CURTESY**.

curtesy initiate in lands of, 243.

dower as separate estate of, 310, 311, 1082.

dower of.

See **DOWER**.

equitable separate estate of, 234, 240, 243, 244, 309, 311, 312, 331, 582, 1080, 1081.

See **EQUITABLE SEPARATE ESTATE**.

fine to convey land of 308, 1079.

foreclosure against, 635.

husband's interest in crops planted by, 49.

husband's interest in land of, before birth of issue, 243.

infant, may repudiate conveyance, 312, 1074, 1081.

joinder of, in husband's deed, 307-318, 295, 1081.

MARRIED WOMAN—Continued.

joinder of, in husband's release, 268.

See **JOINDER**.

power of attorney executed by, 317.

power of sale conferred upon trustee for, 1317.

See **POWER**.

redemption period incident to tax sale prolonged in favor of, when, 1378.

release by, of dower operates by extinguishment, 295, 1210.

release by, of husband's duty to support, as consideration for settlement upon, 1182.

relinquishment of dower rights by, as consideration for settlement upon, 331, 1182.

See **DOWER**.

signature of, to deed, 312, 1137, 1081.

statutory separate estate of, 309, 310, 311, 1082.

See **STATUTORY SEPARATE ESTATE**.

surrender of dower by, before assignment, 1213.

will of, 240, 1250, 1338.

will of, in exercise of power, how executed, 1250, 1338.

See **WILL**; **POWER**.

MAY v. JOYNES, DOCTRINE OF, 162, 200, 858, 1328.

See **LIFE ESTATE**.

MEANDERS OF STREAM,

preferred to courses and distances as description, 60.

See **DESCRIPTION**.

MEASURE OF DAMAGES FOR BREACH OF COVENANT,

403, 414, 1132.

[References to sections]

MECHANICS LIEN,

a statutory lien, 690, 713.
 account filed for general contractor's, 715-717.
 account filed for subcontractor's 719, 721.
 assignment of, 726.
 creditor secured by, not a purchaser, 595.
 discharge of, 728.
 enforcement of, 725.
 estate in land subject to, 724.
 extent of subcontractor's, 719.
 general contractor defined, 714.
 general contractor's, 715-717, 720.
 general contractor's, enuring to subcontractor, 720.
 general nature of, 714.
 notice to general contractor by subcontractor, 719.
 notice to owner of land by subcontractor, 719, 721.
 origin of, 713.
 owner's liability adjusted between general and subcontractor, 722.
 owner's personal liability to subcontractor, 721, 722.
 perfecting of general contractor's, 715-717.
 perfecting of subcontractor's, 718-720.
 priority as between one, and another, 724.
 priority as between, and other liens, 724.
 See **PRIORITY**.
 property subject to, 714, 723, 724.
 record book, 715, 1392.
 recordation of, 715, 1390, 1391, 1392.
 as to all persons, 1390.
 based upon creditor's affidavit, 1394.

2 Min. Real Prop—47**MECHANICS LIEN—Continued.**

satisfaction of, 728.
 subcontractor defined, 714.
 subcontractor's, 718-720.
 subcontractor's, derived from general contractor's, 720.
 waiver of, 727.

MERGER,

conditions of, 813-818.
 covenant prevented from running with reversion by, 424.
 depends on intention, 375, 817.
 estate for life subject to, 215.
 estate for years subject to, 375.
 estate tail not subject to, 191.
 estates, not mere rights, must meet in same person, 813.
 greater estate held upon condition subsequent, 215.
 nature of, 812.
 of consort's freehold in possession by inheritance necessary for curtesy or dower, 237, 273, 276, 277.
 of equitable estate in legal, 485, 818.
 of estate for years in freehold, 375.
 of estate in possession by reversionary estate, 375, 814.
 of estates held in same right, 815.
 of estates limited by same instruments, 816.
 of lesser estate in greater, 215, 375, 814.
 of preceding estate destroys contingent remainder when, 780-782, 816.
 presumption of, stronger in case of reversion than of remainder, 375.
 prevented by interpolation of

[References to sections]

MECHANICS LIEN—Continued.

freehold remainder, 236, 237, 273, 276, 277, 375.

relieved against in equity, 375.

surrender may cause a, 375, 780-782, 1214, 1219.

MERITORIOUS CONSIDERATION, 1311.

See **CONSIDERATION**.

MESSUAGE, MEANING OF, 17.**METES AND BOUNDS, DESCRIPTION BY**, 1151.

See **DESCRIPTION**.

MILL DAM,

a franchise, 67-69.

obstructing flow of stream, 57.

MINERALS,

common of, 73, 74.

See **COMMON**.

conveyance of, distinguished from profit a prendre in, or license, 51.

distinguished from oil or gas, 51.

grantee of, not to injure surface owner, or vice versa, 51.

ownership of surface embraces, when, 19, 51.

profit a prendre in, 70-74.

See **COMMON**; **PROFIT A PRENDRE**.

MINES, 51.

See **MINERALS**.

construction of lease of, 431.

definition of open, 290, 431.

dower in, 290.

tenant's right to work, 431.

MINISTERIAL ACT,

admission of deed to record a, 1393.

taking of acknowledgment not a, 1393, 1398.

MISREPRESENTATIONS,

effect of, upon a conveyance, 1162.

estoppel by, creates title to land when, 1351.

MISTAKE OF FACT,

as to description of lands, 1187.

as to special advantages of property transferred, 1309.

as to title, 1185.

building placed on another's land by, 23.

compensation in equity for, 1184, 1187, 1188, 1308.

compromise based upon, 1188, 1312.

See **COMPROMISE**.

considerations involving, 1184-1188.

contracts of hazard, 1187.

effect of, upon tenant's estoppel to deny landlord's title, 402.

enforceable in equity when, 1306.

in boundaries gives rise to adverse possession, 1036.

in case of judicial sales, 1186.

in habitability of house transferred, 1309.

in levy of tax, 1366.

in listing of land for taxation, 1359.

in proximity to town, 1309.

in quantity of estate or interest, 1307.

in quantity of land, 1308.

in redemption money payable upon tax sale, 1379.

jurisdiction in equity for, though land outside state, 1184.

knowledge by purchaser that there is a, 1309.

legal remedies for, 1306.

parol evidence to show, 1315.

[References to sections]

MISTAKE OF FACT—Cont'd.

purchaser not bound to accept title defective for, 1306.
 reformation of deed for, 1187.
 requisites of, 1186.
 rescission for, 1184, 1186, 1187, 1188.
 revocation of will based upon, 1266.
 specific performance prevented because of, 1306-1309.

MISTAKE OF LAW, 1185.**MISUSER OF FRANCHISE, GROUND OF RESCISSION, 68.****MONOMANIA, AVOIDS WILL, 1243.****MONOPOLY, NOT FAVORED, 69.****MONUMENTS, COURSES AND DISTANCES, DESCRIPTION OF LAND BY REFERENCE TO, 1151.**

See DESCRIPTION.

"edge" and "centre" of, 1151.

meanders of stream preferred to, 60.

meaning of, 1151.

measure of distance, 1151, 1152.

MORTGAGE,

action of ejectment by mortgagee, 630.

action for money by mortgagee, 598, 625, 629.

adverse possession as between grantor and grantee in, 1033, 1039.

agreement under, to set profits against interest, 621.

application of payments upon, 661.

MORTGAGE—Continued.

assignment of debts secured by, 642-646.

assignment of land subject to, 647-651.

assumption of, by purchaser, 287, 340, 598, 647, 648, 1126.

building placed by third person upon land subject to, 23, 724.

cancellation of bond secured by, does not discharge, 598.

change in evidence of debt does not discharge, 598, 662.

chattels annexed to land subject to, 36.

chattels subject to, annexed to land, 27.

condition that whole, shall fall due if interest not punctually paid, 592.

conditional sale distinguished from, 605-609.

conditions of redemption of, 621-624.

contract to convey land as security for debt an equitable, 614.

covenant against incumbrances embraces, 1126.

creditor secured by, a purchaser, 595, 1171, 1172, 1404, 1406.

crops on land subject to, 43.

curtesy in land subject to, 239.

decree confirming sale under, 636.

decree for costs in foreclosure of, 638.

decree of foreclosure of, 635.

deed absolute on face construed a, when, 601.

deed of trust to secure debt distinguished from, 610, 664.

deed of trust wherein trustee's name is left blank a, 614.

[References to sections]

MORTGAGE—Continued.

deed of trust wherein trustee becomes creditor a, 614, 676.
 defeasance formerly a mode of creating, 1228.
 defect in first, aids second, when, 656.
 destruction of subject of, does not destroy mortgagor's liability to pay, 598.
 discharge of, 646, 662.
 distinguished from conditional sale, 603-609.
 from deed of trust, 610, 664.
 from liens in general, 679.
 from pawn or pledge, 604.
 from *vivum vadium*, 603.
 dower in land subject to 269, 285, 286, 287, 339, 340.
 dower in surplus after paying, 283-287.
 dower not allowed to widow of mortgagee, 268.
 dower not allowed to widow of trustee in deed of trust, 268, 662.
 dower to contribute to pay off, 355.
 effect at law of non payment of debt secured by, 599.
 emblements in case of land subject to, 50.
 entry on land by mortgagee, and taking rents and profits, 631.
 equal equities, 653, 657, 660.
 equitable, 613.
 equity of redemption incident to, 599-602, 620-624, 626.
 See **EQUITY OF REDEMPTION**.
 equity later in time superior to prior equity, when, 653.
 equity superior to legal title, if latter acquired with notice, 653, 657, 660.

MORTGAGE—Continued.

estate conveyed in, 597.
 estate of mortgagee after default, 628.
 estate of mortgagee before default, 627.
 estate of mortgagor after default, 619.
 estate of mortgagor before default, 618.
 fixture made subject to, apart from land, 36.
 for term of years, 597.
 foreclosure of, 610, 633-638.
fructus naturales attached to land subject to, 40.
 severed from land by, become personalty, 42.
 implied from deposit of title deeds, 615, 616.
 implies a debt, 598.
 implies a personal obligation on mortgagor's part, 598, 625, 635.
 index of record of, as notice, 1403.
 joinder of wife in, as bar to dower, 315.
 joinder of wife in, does not make her husband's surety, 295.
 later in time, aided by legal title, prevails, 653, 655-657, 660.
 later, superior by reason of misconduct of prior mortgagee, 658.
 later, superior by reason of failure to record first, 659, 660.
 legal title prevails as between equal equities, 653, 657, 660.
 life estate carved out of land subject to, 651.
 life tenant to pay principal and interest of, when, 217.
May v. Joynes not abolished as to, 162.

[References to sections]

MORTGAGE—Continued.

mortgagee a creditor of mortgagor, 598, 625.
 mortgagee as purchaser at tax sale, 1369.
 mortgagee may recover deficit by personal action against mortgagor, 598, 625.
 mortgagee may redeem land from tax sale, 1376.
 mortgagee to account for rents and profits, 621, 625, 635.
 mortgagee to be credited with improvements, 621.
 mortgagee to be credited with taxes paid, 621.
 mortgagee to foreclose, 633-638.
 mortgagor as purchaser at tax sale, 1369.
 nature of, 596.
 negotiable notes, etc., secured by, assigned, 643, 644.
 negotiability of, 644.
 new security for debt does not discharge, 598.
 no personal obligation on purchaser of land subject to, unless he assumes, 598.
 non-negotiable notes, etc., secured by, assigned, 643.
 not affected by fact that debt is barred, 626, 639.
 notice to one holding, of resale of land for taxes, 1374, 1375.
 notice of,
 See NOTICE; PURCHASER.
 of equitable interests, 614.
 of infants' land, 1074, 1075.
 of married woman's land, 309-312, 1081, 1082.
 opening biddings in foreclosure, 637.
 origin of, 596.
 payment of debt discharges, 598, 662.

MORTGAGE—Continued.

payment of debt with interest essential to redemption of, 621.
 power of attorney to creditor authorizing sale, 614.
 power of life tenant to, extinguished by assignment of life estate, 1344.
 See POWER.
 power of sale does not authorize a, 1321.
 power of sale reserved to mortgagee, 611, 612, 632.
 power to appoint in fee authorizes a, 1321.
 prior in time prevails over equal equity, 653.
 priority of, 653-660.
 See PRIORITY.
 promise to execute a, 614.
 proper parties to bill to foreclose, 634.
 redeemed by anyone interested, 601, 621.
 redemption of, 599-602, 620-624, 626.
 See EQUITY OF REDEMPTION.
 registry of, 646, 652, 653, 657, 659, 660, 1390, 1391, 1392, 1405.
 See REGISTRY; PRIORITY.
 release of, discharges, 598, 646, 662.
 release of debt secured by, 646.
 release of, does not discharge debt, 646.
 release of, to be entered on records, 646, 662.
 sale under power reserved to mortgagee, 611, 612, 632.
 satisfaction of, 598, 646, 662.
 presumed after twenty years, 620, 626.
 statute of limitations applicable to, 626, 639.

[References to sections]

MORTGAGE—Continued.

simultaneous alienations of land subject to, 650.

successive assignments of debts secured by, 645.

successive assignments of land subject to, 649.

surrender of bond secured by, does not discharge, 598.

tacking debts to, as condition of redemption, 622, 623, 624.

tacking third, to first, so as to squeeze out second, 657.

title deeds aid later, 655.

title deeds deposited imply, 615, 616.

to secured future advances, 624.

vendor's lien an equitable, 617.
See VENDOR'S LIEN.

Welsh, 620.

who entitled to money on mortgagee's death, 640.

who liable for money on mortgagor's death, 641.

MORTMAIN, STATUTES OF
1090-1095.**MOTION,**

assignment of dower upon heirs' or devisee's, 346.

substitution of trustee upon, 500, 674, 675.

MOTIVE FOR GIFT DOES NOT AFFECT FEE GRANTED, 183.**MUNICIPAL CORPORATION,**

adverse possession as against, 1024.

bound to support adjacent land, when grading streets, 122.

condemnation.

See CONDEMNATION.

dedication.

See DEDICATION.

MUTUAL ASSURANCE SOCIETY LIEN, RECORDED, 1390, 1392.

See REGISTRY; RECORDATION.

MUTUAL MISTAKE, 1184-1188.

See MISTAKE.

MUTUALITY,

of obligation, essential to all contracts, 1289, 1304.

of remedy distinguished from mutuality of obligation, 1289, 1304.

NATURAL GAS, RIGHTS IN, 64.**NAVIGABLE WATERS,**

See PUBLIC WATERS; WATER RIGHTS.

NECESSITY, EASEMENTS BY, 103, 106.**NEGLIGENCE,**

in executing license, 132.

in infringing easement of support immaterial, 122.

waste by, 426, 433, 438, 443, 444.

See WASTE.

NEMO ALLEGANS SUAM TURPITUDINEM AUDIENDUS EST, 1170.**NEMO EST HAERES VIVENTIS,** 745, 747.**NON USER OF FRANCHISE,** 68.**NOTARY, ACKNOWLEDGMENT BEFORE,** 1397.**NOTE,**

assignment of, secured by mortgage, 643, 644.

may take effect as a will, 1251.

[References to sections]

NOTICE,

actual, 489, 1412.
 arising from registry, 1413, 1414.
 as affecting advances made under mortgage to secure future advances, 624.
 constructive, 489, 1413, 1414.
 estate at will requires no, to terminate, 385, 387.
 estate from year to year requires, 390, 391, 392.
 evidence of, 1413.
 from failure to inquire, 1413.
 from possession, 1413.
 from public act of legislature, 1413.
 from registry, 1413, 1414.
 See **REGISTRY**.
 of application for resale of land for taxes, 1374, 1375.
 of fraud, 1162, 1172-1183.
 See **FRAUD; FRAUDULENT CONVEYANCE**.
 of matters referred to in known writing, 1413.
 of tax sale, 1358, 1363, 1374, 1386.
 purchaser without, 1172, 1183, 1409, 1410.
 See **PURCHASER; COMPLETE PURCHASER**.
 quit claim deed as, of defective title, 1211.
 rent unpaid after, forfeits tenant's estate when, 526.
 to agent is, to principal, 1413.
 to general contractor by subcontractor, 719.
 to one cotenant enures to all, 887.
 to owner of land by subcontractor, 719, 721.
 waiver of, in case of estate from year to year, 392.

NUISANCE,

landlord's liability for, on leased premises, 394.

NULLUM TEMPUS OCCURRIT REGI, 1024.**OCCUPANCY,**

 See **POSSESSION; ADVERSE POSSESSION**.
 title by, 202, 203, 1004-1008.
 arises in case of estate pur auter vie, 202, 203, 1005.
 general, 202, 203, 1006, 1007.
 general, abolished in Virginia, 203, 1008.
 in incorporeal property, 1007.
 mention of "heirs" makes special, 1006.
 nature of, 1005.
 personal representative succeeds, in place of occupant, 203, 1008.
 special, 202, 1006, 1007.
 special, abolished in Virginia, 203, 1008.

OFFICE COPY,

of probated will as evidence, 1281.
 of registered deed as evidence, 1401.

OIL, PROPERTY RIGHTS IN, 62, 64.**OLD AGE, EFFECT OF, ON WILL, 1242.****OPENING BIDDINGS IN FORECLOSURE PROCEEDINGS, 637.****OPTION, EQUITABLE CONVERSION UNDER, 474.**

 See **EQUITABLE CONVERSION; CONTRACT TO CONVEY**.

[References to sections]

ORDER OF PUBLICATION,
in suits for partition, 961.

ORNAMENTAL FIXTURES, 34.
See **FIXTURE.**

PARAMOUNT TITLE
See **TITLE PARAMOUNT.**

PARCENER,
See **COPARCENER.**

**PARENT'S CONTRACT TEND-
ING TO COERCE CHILD,**
1314.

**PARK, DEDICATION OF LAND
FOR, 1353-1355.**
See **DEDICATION; EASEMENT.**

PAROL,
See **EVIDENCE.**
assignment by, 1225.
bargain and sale by, 1232.
constructive trusts by, 467, 479.
conveyance by, when valid, 362,
467, 475, 479, 1099, 1101.
See **CONVEYANCE; STATUTE OF
FRAUDS; TRUST.**
deed absolute on face, shown to
be mortgage by, 601.
discharge of written contract by,
1315.
mortgage by, in case of deposit
of title deeds, 615.
resulting trusts by, 467, 468, 475.
surrender by, 1217.
terms of written will cannot be
qualified by, 1251.
writing altered by, 47, 601, 1232,
1315.

**PAROL AGREEMENTS, STAT-
UTE OF,**
See **STATUTES OF FRAUDS.**

PAROL EVIDENCE,
See **EVIDENCE; PAROL.**

PART PERFORMANCE,
abstaining from an act insuf-
ficient for, 1293.
act must be done, 1293.
act must be done by party seek-
ing relief, 1294.
act must be incapable of com-
pensation in damages, 1296.
act must be in consequence of
agreement, 1295.
act must be one which, but for
the promise, would not have
been done, 1295.
act must be unequivocal, 1295.
and with design to perform con-
tract, 1295.
circumstances necessary for,
1292.
continuance in possession as,
1295.
delivery of possession by vendor
as, 1295.
improvements by vendee as,
1295.
of contract to lease, 363.
of oral compromise of boundary
line, 1036.
of oral grant of easement, 100.
payment of purchase price as,
1296.
performance of ordinary service
or labor as, 1296.
reason for doctrine of, 1292.
statutory modifications of, 1297.
takes oral contract to convey
out of statute of Frauds, 363,
1292-1297.
taking possession by vendee as,
1294, 1295.
taking possession of one tract
enures to all, 1295.
valuation of timber as, 1295.
viewing of estate as, 1295.

[References to sections]

PARTITION,

a common law conveyance, when, 1203.
 account of improvements and profits in suit for, 962.
 advancements thrown into hotchpot upon, 948-954.
 See **HOTCHPOT**.
 as between coparceners, 900, 942, 946, 947, 956, 1203.
 as between joint tenants, 900-903, 956, 1203.
 as between tenants by entireties, 910.
 as between tenants in common, 900, 928, 956, 1203.
 assignment of land to each cotenant in severalty, if practicable, 963.
 commissioners to execute deeds for, 965.
 commissioners to make, 962, 963.
 compulsory, 900, 942, 956, 957-965, 1203.
 contract for, suffices in equity, 901, 902.
 decree for, 965.
 decree for, vests legal title, 963, 965, 1203.
 decree for costs in suit for, 964.
 deed necessary for, when, 901, 902, 1203.
 defendant in suit for, an infant, 965.
 distress for rent granted for owelty of, 87.
 division of land upon suit for, 963.
 dower in land sold under decree for, 270.
 equal, among appointees, in case of appointment set aside as illusory, 1320.

PARTITION—Continued.

in case of power coupled with a trust, 1330.
 fraud in, avoids, 903.
 grounds of equitable jurisdiction for, 958.
 inequality in, does not avoid, 903.
 interlocutory decree in suit for, 962.
 land subject to, in adverse possession of strangers, 959.
 legal questions affecting plaintiff's title determined in suit in equity for, 959.
 legal title vested by decree for, 963, 965, 1203.
 mutual conveyances decreed in suit for, 965.
 order of publication in suit for, 961.
 procedure for, by writ of, 957.
 procedure for, in equity, 958, 965.
 not a substitute for action of ejectment, 959.
 process in suit for, against parties unknown or nonresident, 961.
 proper parties to suit for, 960.
 registry of, 1390, 1392.
 rent granted in owelty of, 963.
 sale of land in suit for, 963.
 voluntary, 900-903, 910, 928, 946, 947 1203.
 warranty implied in voluntary, 947.

PARTNERSHIP LAND,

dower in, 21, 271.
 equitable conversion of, into personalty, 21, 271, 476.
 as to firm creditors, 21.

[References to sections]

- PARTNERSHIP LAND** — Continued.
 as between heir and personal representative of dead partner, 21.
 as to dower of dead partner's widow, 21, 271.
 duration of conversion, 21.
 implied trust in, 476.
- PARTY WALL,**
 See **SUPPORT.**
 contribution for building and maintenance of, 125.
 may be built partly on land of each, with mutual easements of support, 125.
 may be property of one or both, without any easement, 125.
 may belong to one, with easement in another, 125.
 nature of adjoining owner's interest in, 124, 125.
 use of, 125.
- PASTURE, COMMON OF,** 72, 74.
- PAWN,**
 distinguished from hypothecation, 596.
 distinguished from mortgage, 604.
- PAYMENTS, APPLICATION OF, TO MORTGAGE,** 661.
- PEDIS POSITIO, NEEDFUL FOR ACTUAL SEISIN,** 141.
 See **SEISIN; DISSEISIN; ADVERSE POSSESSION.**
- PENALTY, RELIEF IN EQUITY AGAINST,** 591-594.
 See **CONDITION.**
- PERCOLATING WATER,** 62.
 See **WATER RIGHTS.**
- PERMISSIVE WASTE,** 426, 433, 438, 443, 444.
 See **WASTE.**
- PERPETUITIES, RULE AGAINST,**
 See **RULE AGAINST PERPETUITIES.**
- PERSONAL FIXTURE,**
 See **FIXTURE.**
- PERSONAL PROPERTY,**
 See **CHATTELS.**
 may become realty, and vice versa, 24.
 See **FIXTURE.**
 primary liability of, in case of tax sale of delinquent land, 1361.
 See **TAX SALE.**
 rent cannot issue out of, 82, 84.
 See **RENT.**
- PERSONAL REPRESENTATIVE,**
 See **EXECUTOR.**
- PETIT SERGEANTY, TENURE BY,** 6.
- PETROLEUM OIL, RIGHTS IN,** 62, 64.
- PEW, EASEMENTS IN,** 130.
 See **EASEMENT.**
- PISCARY, COMMON OF,** 73, 74.
 See **COMMON; PROFIT A PRENDRE.**
- PLAT OR MAP,**
 dedication of streets, etc., marked on, 1354.
 See **DEDICATION.**
 description of land by reference to, 1150.
 See **DESCRIPTION.**

[References to sections]

PLAT OR MAP—Continued.

estoppel to prevent vendee's use
of streets marked on, 109.

See **ESTOPPEL**.

recording of, 1150.

PLEDGE OR PAWN OF CHATTELS, 596, 604.**POLICE POWER, FRANCHISE SUBJECT TO, 68.****POLLUTION,**

See **EASEMENT; WATER RIGHTS.**

of air, 127, 103.

of percolating water, 62, 103.

of subterranean streams, 61, 103.

of surface streams, 55, 56, 103.

of surface water, 103, 128.

POND, DESCRIBED IN CONVEYANCE, 19.**POSSESSIO FRATRIS, DOCTRINE OF, 979.****POSSESSION,**

adverse,

See **ADVERSE POSSESSION; DISSEISIN.**

continuance in, as act of part
performance, 1295.

See **PART PERFORMANCE.**

notice of title of one in, 1413.

See **NOTICE.**

of joint tenants, 884, 887, 892,
893.

of one cotenant enures to all,
887.

taken by vendee as act of part
performance, 1294, 1295.

POSSIBILITY OF REVERTER,

always contingent, 807, 819.

upon fee conditional, 175, 176,
819.

POSSIBILITY OF REVERTER—Continued.

upon fee on condition subsequent, 537, 819.

upon fee qualified, 171, 819.

POSTNUPTIAL SETTLEMENT,

as bar to dower, 331.

by insolvent husband presumed
voluntary, 1181.

marriage not a consideration
for, 1181.

presumed actually fraudulent,
when, 1181.

POWER,

agreement in fraud of, not, specifically enforceable, 1314.

appendant or appurtenant, 1344.

appointee under, 1318.

not bound by covenant in
lease, 422.

takes under instrument creating,
1325, 1329.

within the consideration, 1325,
1329.

appointee under statutory, takes
under statute, 1324.

appointment due to prejudice,
1339.

appointment under, defined, 1318.

to estates partly within, and
partly beyond, 1337.

to persons not within, 1337.

to uses, 1325.

appointment violative of condition precedent, 1337.

arising at common law, 1323.

arising by executory limitation,
1237, 1325.

arising by implication, 162, 200,
858, 1328.

arising in equity, 1325.

arising under statutes, 666, 1324,
1325, 1327.

[References to sections]

POWER—Continued.

assignment of naked or bare, 1226.
 assignment of, coupled with an interest, 1226.
 circumstances prescribed by instrument creating must be followed, 1333.
 collateral, 1344.
 compulsory execution of, 1330, 1336, 1338.
 condition precedent to exercise of, 1322, 1337, 1343.
 contingent interests under, 1330, 1336.
 coupled with an interest, 666, 1317, 1331, 1332, 1334, 1344,
 coupled with a trust, 1330, 1331, 1336, 1345.
 covenant appropriate in deed under, 1124.
 creditor may subject land to donee's debts when, 1319.
 death, etc., of one of several donees of, 1332.
 defective execution of, aided in equity, 1338.
 defective execution of, void at law, 1333.
 definition of, 1318.
 delegation of, 1331.
 donee and donor of, 1318.
 donee of, estopped to exercise, 1344.
 donee of, may appoint to whom, 1319.
 donee of, may delegate, when, 666, 674, 1331.
 donee of, may release, when, 1345.
 equitable, 1325.
 estoppel of donee to exercise, 1344.
 exclusive, 1319.

POWER—Continued.

executory limitation created under, 1237, 1325.
 See EXECUTORY LIMITATION.
 exercise of,
 by deed, 1333.
 See DEED.
 by joint donees, 1332.
 by will, 1333.
 See WILL.
 compelled in equity when, 1330, 1336, 1338.
 coupled with an interest, 666, 1317, 1331, 1332, 1334, 1344.
 coupled with a trust, 1330, 1331, 1336, 1345.
 defective, 1333, 1338.
 dependent on donee's intent, 1334.
 excessive, 1337.
 fraudulent, 1339.
 in accord with terms of, 1329.
 omitted, 1336.
 postponed, 1335.
 extinguishment of, 1340-1345.
 formalities of exercise of, 1333, 1338.
 general, defined, 1319.
 appointees under, unlimited, 1319.
 conditions of exercise of, 1322, 1334.
 donee's creditors may subject land held under, 1319.
 interest to be created under, 1321.
 may be delegated, 1331.
 rule against perpetuities applied to, 1326.
 See RULE AGAINST PERPETUITIES.
 illusory appointment under, 1320.
 in gross, 1344.
 intent to exercise, how shown, 1334.

[References to sections]

POWER—Continued.

joint, to be jointly exercised
when, 509, 519, 674, 675, 1332.
lapse of will in exercise of, 1333.
See **LAPSED DEVISE**.
lease under, grantor having no
estate, 1200.
marriage as revoking will in ex-
ercise of, 1271.
mode of exercising, 1333, 1338.
naked or bare, 1226, 1317, 1332,
1334, 1344, 1345.
nature of, 1318, 1319.
nonexclusive, 1319.
of alienation annexed to life es-
tate creates fee when, 162, 200,
208, 858, 1328.
statutory, 666, 1324.
survivorship between joint
donees of, 675, 1332.
suspension of, 1340-1345.
time of execution of, 1335.
to executor, etc., in official capac-
ity, 666, 674, 1331, 1332.
vested interests under, when,
1330, 1336.
of alienation in general,
See **ALIENATION**; **ASSIGNMENT**.
of appointment.
arising under statutes of Uses,
etc., 449, 450, 1237, 1325.
carries power to create lesser
freehold or mortgage, 1321.
dower defeated by exercise of,
301, 1329.
joinder of wife not needful to
exercise of, 301.
release of, 1210, 1345.
of attorney, 1105.
See **AGENT**; **POWER OF ATTOR-
NEY**.
of dividing estate, 1321, 1330,
1336, 1342.
of executor or administrator,

POWER—Continued.

1323, 1324, 1330, 1331, 1332,
1342, 1317.
of making leases under statute,
1324.
of revocation, 449, 450, 1327.
of sale.
authorizes conveyance, 1321.
but not mortgage nor ex-
change, 1321.
conferred upon mortgagee, 611,
612, 632.
for division which is otherwise
made, 1342.
implied in will, 1328.
in executor, etc., 1323, 1330,
1332, 1317.
in trustee, 666, 674, 1317, 1323,
1330, 1332, 1342.
to pay debts, not exercisable if
no debts, 1322.
to support one who dies, 1342.
person taking in default of ap-
pointment has legal title till
exercise of, 1319.
release of, by donee, 1210, 1345.
rule against perpetuities applied
to, 1326.
scope of, 1319-1322.
seisin of donee defeated by ex-
ercise of, 301, 1329.
shares to be taken under ex-
ercise of, 1330, 1333, 1336.
simply collateral, 1344, 1345.
special.
appointees under, restricted,
1319.
conditions and purposes of,
limited, 1322.
coupled with a trust, 1330.
defined, 1319.
delegation of, 1331, 1332.
excessive exercise of, 1337.
extinguishment of, 1340-1345.

[References to sections]

POWER—Continued.

- failure to exercise, 1336.
- fraudulent exercise of, 1339.
- interests to be created under, 1321.
- mode of appointment under, 1319, 1333, 1334.
- release of, 1210, 1345.
- rule against perpetuities applied to, 1326.

POWER OF ATTORNEY,

See AGENT.

- conveyance made under, 1105.
- death of agent revokes, 1105.
- executed by married woman, 317.
- executed outside Virginia, acknowledgment of, 1400.
- registry of, 1392.
- revocation of, 1105.
- to be construed strictly, 1105.
- to convey distinguished from authority of real estate agent, 1105.
- to creditor authorizing sale, equivalent to equitable mortgage, 614.
- to execute sealed instrument must be under seal, 1105.

PRECATORY TRUST, 520.

See TRUST.

PREFERENCE OF CREDITORS IN ASSIGNMENT, 1177.

See FRAUD; FRAUDULENT CONVEYANCE.

PREMISES CLAUSE IN DEED,

- consideration contained in, 1109.
- function of, 1109.
- grantor and grantee described in, 1109, 1110.
- habendum clause may qualify, 1110.
- See HABENDUM.
- recitals contained in, 1109.

PRESCRIPTION,

- allowance of disabilities for, 1059.
- applies only to estates of inheritance, 1067.
- applies only to property lying in grant, 1057.
- continuity of user necessary for, 1061.
- criterion of title by, 1065, 1066.
- distinguished from adverse possession, 1055.
- distinguished from local custom, 1056.
- easement acquired by, 108, 127, 1055, 1057.
- easement arising by, extends how far, 108, 1060.
- easement extinguished by, when, 114.
- See EASEMENT.
- effect upon, of acts checking user, 1062.
- effect upon, of protests by owner, 1061, 1062.
- exclusiveness of enjoyment under, 1064.
- hostile character of, 1065, 1066.
- notoriousness of user under, 1063.
- period of, 1058, 1059.
- protests of owner affect, 1062.
- right under, arises to extent of customary user, 108, 1060.
- tacking of adverse users, 1061.

PRETENSED TITLES, STATUTE OF, 1071.**PRETERMITTED CHILD, WILL REVOKED IN FAVOR OF, 1272-1274.**

See WILL.

PRINCIPAL AND AGENT,

See AGENT; POWER OF ATTORNEY.

[References to sections]

PRIORITY,

- as between assignments of debts secured by vendor's lien, 684.
- as between assignments of land subject to vendor's lien, 685.
- as between attachment creditors, 1416.
- as between dower and husband's debts, 339, 340, 355.
- as between dower and husband's lessee, 273, 355.
- as between dower of widow of vendee under contract of sale and vendee's assignee, 284.
- as between dower of vendee's widow and vendor's lien, 284. See DOWER.
- as between grantee of equitable title and subsequent grantee of legal title after acquired by grantor, 1414.
- as between judgment and attachment creditors, 1416.
- as between judgment creditor and purchaser, 700, 701, 1407, 1418.
- as between judgment creditors, 700, 1416.
- as between lien creditors, generally, 1416.
- as between lien creditors and purchasers, 1407, 1418.
- as between mechanics liens, 724, 1416.
- as between mechanics liens and other liens, 724.
- as between mortgagee and assignees of mortgage debt, 643-646.
- as between mortgagor and assignee of land, assuming mortgage debt, 647, 648.
- as between mortgagor and as-

PRIORITY—Continued.

- signee of land, not assuming mortgage, 647, 648.
- as between mortgagor and assignee of part of land, 648.
- as between purchasers of judgments, 702.
- as between purchasers of land subject to judgment, 703-706.
- as between purchasers of same tract of land, 1407, 1417.
- as between purchaser from husband and his heir or devisee, in respect of widow's dower, 349.
- as between purchasers of successive parcels of land in respect of widow's dower, 349.
- as between simultaneous assignments of parts of land subject to mortgage, 650.
- as between successive assignees of parts of mortgaged land, 649.
- as between vendor of land and dower of vendee's widow, 284.
- created by failure to record prior mortgage, 659, 660.
- created by misconduct of prior mortgagee, 658.
- of creditors over grantee in unrecorded deed, 1404.
- of grantee in unrecorded deed over a volunteer, 1406, 1408.
- over purchaser with notice, 1406, 1409, 1411, 1412.
- of holder of equitable interest in debtor's land over creditors, 1404.
- of judgment creditor of vendee of land as against vendee's assignee, 474.
- of judgment creditor over

[References to sections]

PRIORITY—Continued.

- grantees in mutual conveyances, one of which is unrecorded, 1404.
- of later mortgage, if aided by legal title, 655-657.
- of later mortgage, if aided by title deeds, 655.
- of later mortgage over defective first mortgage, 656.
- of legal title over one having equal equity, 653, 657, 660.
- of purchasers from grantor over grantee in unrecorded deed, 1406.
- of purchasers from heir over devisee in unrecorded will, 1281.
- of superior equity over inferior equity, 653.
- of superior equity over legal title, 653.
- of surety paying debt to grantee of unrecorded deed, 1404.
- of time controls as between equal equities, 653.
- tacking of third mortgage to first, so as to squeeze out second, 657.

PRIVATE WATERS,

- as boundaries, 60, 1151.
- ownership of, 59.

PRIVATE WAY,

- See WAY.

PRIVITY,

- adverse possession of one beginning his estate in, with owner, 1033, 1039.

PRIVITY OF CONTRACT,

- one in, bound by covenants though land be assigned, 423, 424.

PRIVITY OF ESTATE,

- for covenants running with land prevented by exercise of power, 1329.
- mortgagee cannot sue mortgagor's lessee for rent, for want of, when, 631.
- necessary to confirmation by enlargement, 1222.
- necessary to covenants running with land, 422, 1118, 1120.
- necessary to covenants running with reversion, 424.
- necessary to release by enlargement, 1209.
- necessary to release passing an estate, 1208.
- necessary to surrender, 1215.
- necessary to tack one possession to another under statute of Limitations, 1028-1031.
- not necessary to confirmation making sure a voidable estate, 1221.

PRIVY EXAMINATION OF WIFE, 308, 309, 311, 312.**PRO TURPI CAUSA,**

- conditions, 568.
- considerations, 1159.

PROBATE OF WILL, 1281.

- See WILL.

PROCESS,

- See DUE PROCESS OF LAW.
- in partition suits, 961.

PROFIT A PRENDRE,

- apportionment of, 74.
- See COMMON.
- appurtenant to land, 71.
- appurtenant, passes with land, 1155.

[References to sections]

PROFIT A PRENDRE — Continued.
 conveyance of minerals in place distinguished from, 51.
 created by grant, 70.
 created by prescription, 1055, 1057.
 See **PRESCRIPTION**.
 easement distinguished from, 70, 96.
 extent of right limited by needs of land, 71.
 grant of, carries all rights necessary to enjoyment of, 70.
 in gross, 71.
 may be exclusive or in common, 70.
 nature of, 70.
 rent cannot issue out of a, 82.

PROHIBITION, WRIT OF,
 to prevent justice from assuming jurisdiction of freehold rent, 79.

PROMISE,
 See **CONTRACT**.

PROMISSORY NOTE,
 See **NOTE**.

PROOF,
 See **EVIDENCE**.

PROSPECT, EASEMENT OF, 127.
 See **EASEMENT**.

PUBLIC ENEMY, INJURIES TO INHERITANCE BY, NOT WASTE, 426, 444.

PUBLIC GRANT, STATUTE OF LIMITATIONS APPLIED TO, 1051.

2 Min. Real Prop—48

PUBLIC MINISTER, ACKNOWLEDGMENT BEFORE, 1397.

PUBLIC USE,
 land dedicated to, 1353-1355.
 See **DEDICATION**.
 land taken for,
 See **CONDEMNATION**; **EMINENT DOMAIN**.

PUBLIC WATERS,
 accretions in, 1010.
 See **ACCRETION**.
 alluvion, 1010, 1012, 1013.
 See **ALLUVION**.
 as boundaries to property, 60, 1151.
 at common law, 58.
 belong to state, 58.
 held in trust for people, 58.
 in United States, 58.
 in Virginia, 58.
 islands arising in, 1015.
 limit of State's dominion over, 58.
 riparian owner's interest in, 58, 60.

PUBLICATION,
 of notice of tax sale, 1363, 1374, 1375.
 of will, 1275.
 order of,
 in partition suit, 961.
 in tax sale, 1358, 1363, 1374.

PUR AUTER VIE, ESTATE,
 See **FREEHOLD**; **LIFE ESTATE**; **OCCUPANCY**.

PURCHASE, TITLE BY,
 arises by act of parties, 966, 1003.
 distinguished from title by descent, 966, 968, 969.
 words of, contrasted with words of limitation, 151-160.

[References to sections]

PURCHASE MONEY,

See CONSIDERATION; LIEN;
MORTGAGE; VENDOR'S LIEN;
VENDEE'S LIEN.

lien of incomplete purchaser for,
1409.

paid in installments, not rent, 81.

payment of, compelled in judicial sale, 635.

payment of, not sufficient act of part performance, 1296.

See PART PERFORMANCE.

PURCHASER,

action by, of land along polluted stream, with notice of pollution, 56.

assignment to, by vendee under contract of sale, 474.

at judicial sale for benefit of creditor, protected as incident to creditor's protection, 1171, 1172, 1404.

at resale of land for taxes has right to tax deed, 1374, 1375, 1381.

at tax sale, redemption money payable to, when, 1377.

right of, to enter before tax deed, 1385.

right of, to compel execution of tax deed, 1374, 1381.

title conferred upon, by tax deed, 1385.

who may be, 1369-1372.

becomes such at date of, deed, not of registry, 704.

bound by grantor's promise to devise land, if he has notice thereof, 1284.

building on land, though belonging to another, passes with land to, when, 23.

capacity to be a,

See CAPACITY.

PURCHASER—Continued.

capacity to be a, at tax sale, 1369-1372.

See TAX SALE.

chattels mortgaged become fixtures as against, of land when, 27.

complete purchaser.

See COMPLETE PURCHASER.

creditor may subject land in hands of a, 969, 165.

creditor secured by equitable or statutory lien not a, 595.

creditor secured by mortgage or deed of trust is a, 595, 1171, 1172, 1404.

creditor secured by vendor's lien not a, 595, 682.

creditor whose debt is paid by conveyance a, 1172.

defined, 595, 1172.

dower as against, assuming mortgage, 340.

dower assigned by, 346.

dower assigned in land in inverse order of alienation, 349.

dower is estate which is void as to, 266.

dower of wife of, as against vendor's wife, 274, 275.

See DOWER.

equity aids a, taking under defective execution of a power, 1338.

See POWER.

estoppel transferring after acquired title affects subsequent, of same title from grantor, 1350.

See ESTOPPEL.

evidence of fraud unavailing against, for value and without notice, 1183.

See FRAUD; FRAUDULENT CONVEYANCE.

[References to sections]

PURCHASER—Continued.

fixture transferred affects a severance as against, with notice, 36, 40.
 for value and without notice, See COMPLETE PURCHASER.
 grantee of profit a, of part of servient land causes an apportionment of profit, 74.
 grantee in consideration of marriage a, when, 1172, 1181.
 heir taking as special occupant, does not take as, 202.
 infants' conveyance repudiated as against, without notice, 1074.
 issue of marriage taking as, bars curtesy and dower, 238, 273.
 See CURTESY; DOWER.
 joinder of wife in conveyance to, operates only in favor of, or his privies, 295.
 measure of damages against, for withholding dower, 354.
 mortgage implied from deposit of title deeds as against, 615, 616.
 obligation of, to see purchase money applied, 490-496.
 of cemetery lot, 130.
 of debts secured by mortgage, 642-646.
 of debts secured by mechanic's lien, 726.
 of debts secured by vendor's lien, 684.
 of judgments, 702.
 of land subject to attachment lien, 595, 656, 657, 710.
 of land subject to dower, 266, 274, 275, 340, 346, 349.
 of land subject to judgment lien, 703-706.
 of land subject to mechanics lien, 724.

PURCHASER—Continued.

of land subject to mortgage, 647-651.
 assuming mortgage debt, 287, 340, 598, 647, 648, 1126.
 otherwise not personally liable for debt, 598.
 when mortgage is to secure future advances, 624.
 of land subject to vendor's lien, 685.
 of pew in a church, 130.
 of trust subject, 512-515.
 oral contract to convey, though partly performed, void as to, if not recorded, 1297.
 quasi easements converted into easements in favor of, when, 104, 107.
 quit claim deed as notice of defective title to, 1211.
 real estate agent's duty to procure a, 1105.
 recordation of transactions as against, 700, 1390, 1405.
 recordation of transactions, as against creditors as well as, 700, 1390, 1405.
 See RECORDATION; REGISTRY.
 rent apportioned if lessor becomes a, of part of land out of which rent issues, 90.
 rent reserved to grantor's "son" is a reservation to a, and is bad, 83.
 See RENT.
 servient tract transferred to, without notice of easement, extinguishes it, 117.
 See EASEMENT.
 subrogation in favor of, of land subject to mortgage, 647, 648.
 subject to vendor's lien, 685.

[References to sections]

PURCHASER—Continued.

trustee as a, of trust subject, 512-515.

See **TRUST**; **TRUSTEE**.

valuation of lands in hands of, for dower of grantor's widow, 343, 344.

with notice of trust, himself a trustee, 488, 1172, 1317.

without notice of trust, not bound by trust, 483, 487, 488, 489.

writing may be void as to, for vague description, though duly recorded, 1402.

QUARANTINE, WIDOW'S, 338.

See **DOWER**.

QUARRY, DOWER IN, 290.

See **MINERALS**; **MINES**.

QUASI EASEMENTS, 95, 104, 107.

See **EASEMENTS**.

QUASI REVERSION, 171, 807, 819.

See **REVERTER**; **POSSIBILITY OF REVERTER**.

QUIA EMPTORES, STATUTE OF, 5, 12.**QUIET ENJOYMENT, COVENANT OF**, 1125.

See **COVENANT**.

QUIT CLAIM DEED,

contains no covenants of title, 1211.

contrasted with release, 1211.

excludes implication of good title in grantor, 1211.

grantee under, need not be in possession, 1211.

QUIT CLAIM DEED—Cont'd.

ipso facto notice of defective title, 1211.

no transfer of after acquired title by estoppel in case of, 1350.

notice to purchaser of outstanding claims though unrecorded, 1211, 1390.

words of limitation in, 159.

QUO WARRANTO,

deed of corporation when impeachable by, 1085, 1095.

REAL ESTATE AGENT,

authority of, 1105.

commissions of, 1105.

duty of, when performed, 1105.

REAL FIXTURES,

See **FIXTURE**.

REAL PROPERTY,

See **LAND**.

may become personalty, and vice versa, 24.

REBUTTER, ANCIENT WARRANTY OPERATING BY WAY OF, 1114, 1116.

See **WARRANTY**.

RECITALS,

contained in premises of deed, 1109.

See **DEED**.

contained in tax deed, 1383.

See **TAX DEED**.

contained in trustee's deed, 666.

of good title in deed ground for passing after acquired title by estoppel, 1350.

See **ESTOPPEL**.

[References to sections]

RECORD,

admission to,

See ADMISSION TO RECORD; REGISTRY.

interest arising by matter of,
cannot arise by prescription,
1057.**RECORDATION,**

See REGISTRY.

actual, as distinguished from admission to record, 1393.

See ADMISSION TO RECORD.

index to books of, as notice, 1403.
of acceptance of dedication of country road, 1355.

of attachment lien, 710, 1390, 1391, 1392, 1393.

of judgment, 700, 701, 1390, 1391, 1392, 1393.

based on abstract of court records, 1394.

of lis pendens, 711, 1390, 1391, 1392.

of map or plat showing streets, etc., when a dedication, 1354.

of mechanics lien, 715, 1390, 1391, 1392, 1394.

of mortgages and deeds of trust, 1390, 1391, 1392, 1393.

See MORTGAGE; DEED OF TRUST; REGISTRY.

of will of land, as against purchaser from heir, 1281.

place and time of, 1391, 1392.

REDDENDUM CLAUSE IN DEED OR LEASE, 1112.

easements, etc., reserved in, 1112.

See EASEMENT.

rent reserved in, 1112.

See RENT.

REDEMPTION FROM MORTGAGE,

See MORTGAGE; EQUITY OF REDEMPTION.

REDEMPTION FROM TAX SALE,

amount to be paid for, 1379.

concealment or fraud preventing, may be shown despite tax deed, 1386.

may be shown to avoid sale despite tax deed, 1386.

no new title created by, 1376.

period allowed for, 1378.

retrospective legislation touching, 1380.

to whom money for, payable, 1377.

who may exercise right of, 1376.

RE-ENTRY,

for breach of express condition, 532-539.

for breach of implied condition, 210, 371, 526.

See CONDITION; ENTRY.

registry of written act of, 539, 1390, 1392.

REFORMATION OF DEED, 1187.**REGISTRY,**

acknowledgment as a mode of authenticating writing for, 1396-1400.

See ACKNOWLEDGMENT.

authentication of writings for, 1394-1400.

by abstract of court records, 1394.

by acknowledgment, 1396-1400.
by affidavit of creditor, 1394.

by proof by two witnesses, 1395.

[References to sections]

REGISTRY—Continued.

books of, kept in clerk's office, 1392.
 deed books, 1392.
 delinquent land books, 1392.
 delinquent tax books, 1392.
 judgment docket books, 1392.
 mechanics lien record, 1392.
 Mutual Assurance Soc. lien book, 1392.
 repository of unrecorded deeds, 1392.
 will books, 1392.
 creditors protected by, 1404.
 effect of,
 as between parties, 1146, 1384, 1401, 1402.
 as constructive notice, 1414.
 as evidence, 1401.
 as evidence of delivery of deed, 1142.
 as to creditors and purchasers, 1402-1418.
 in case of writing containing vague descriptions, 1402.
 index to books of, as notice, 1403.
 nature of, 1393.
 notice under laws of, 1411-1413.
 of assignment of dower, 1390, 1392.
 of attachment lien, 710, 1390, 1391, 1392, 1393, 1405.
 of condemnation proceedings, 1390, 1392.
 of contract in consideration of marriage, 1390, 1391, 1392.
 of contract to convey or lease land, 1390, 1391, 1392, 1393, 1405.
 of conveyance of land, 1390, 1391, 1392, 1393, 1405.
 of decree for land, 1390, 1392.

REGISTRY—Continued.

of decree for money, 1390, 1391, 1392, 1393.
 of deed of trust, 1390, 1391, 1392, 1393, 1405.
 of judgment for land, 1390, 1392.
 of judgment for money, 700, 701, 1390, 1391, 1392, 1393, 1405.
 of labor lien, 1392.
 of lease for more than five years, 1390, 1391.
 of lien on crops, 1390, 1392.
 of lien for taxes, 1390.
 of lis pendens, 700, 711, 1390, 1391, 1392, 1393, 1405.
 of map or plat, 1150.
 of married woman's conveyance necessary to validity as between parties, 1081.
 of mechanics lien, 715, 1390, 1391, 1392.
 of mortgage, 1390, 1391, 1392, 1393, 1405.
 of mortgage to secure future advances, 624.
 of Mutual Assurance Society lien, 1390, 1392.
 of new deed in place of lost deed, 1391.
 of partition of lands, 1390, 1392.
 of power of attorney, 311, 312, 1392.
 of supply lien, 1392.
 of tax deed, 1384.
 of vendor's lien, 1390.
 of will of lands, 1281, 1390.
 of written act of re-entry, 539, 1390, 1392.
 of writings affecting land lying in several counties, 1392.
 origin and purposes of, 1389.
 parties as to whom, necessary, 1390, 1405.

[References to sections]

REGISTRY—Continued.

- as to creditors as well as subsequent purchasers, 1390, 1405.
- as to subsequent purchasers only, 1390.
- place of, 1392, 1405.
- priorities under laws of, 1415-1418.
- See PRIORITY.
- purchasers who are protected by, 1406-1414.
- distinguished from creditors, 1406.
- must be subsequent purchasers, 1407.
- must be for value, 1408.
- must be "complete purchaser," 1409, 1410.
- See COMPLETE PURCHASER.
- must be without notice, 1411-1413.
- See NOTICE.
- who is a purchaser under laws of, 1406.
- second delivery of deed after, 1143.
- time within which to be made, 1391.
- to what transactions applicable, 1390.

RELATIONSHIP, DEGREES OF, 972-976.**RELEASE,**

- a secondary conveyance at common law, 1204.
- contingent remainder transferred by, 803, 1210.
- contrasted with surrender, 1212.
- covenant of title not subject to, by one who has parted with possession, 1131.
- enlarging an estate, 1209.

RELEASE—Continued.

- practically identical with confirmation by enlargement, 1222.
- enlarging lease under statute of Uses, 455, 456, 466.
- enuring by extinguishing a right, 1210.
- enuring by passing estate, 1208.
- enuring by passing right, 1207.
- essentials of, enlarging estate, 1209.
- from disseisee to disseisor, 1207.
- from disseisee to disseisor's life tenant, 1207.
- from lessor to disseisor of life tenant, 1210.
- from one coparcener to another, 1208.
- from one joint tenant to another, 888, 1208.
- invalid, good as a grant, 1208, 1209.
- invalid, good as a statutory, 1209.
- livery of seisin when unnecessary, 1209.
- nature of, 1205, 1207-1210.
- of debt secured by mortgage is, of mortgage, 646.
- of debtor from further liability, in case of assignment, 1176.
- of deed of trust, 598, 662.
- of dower, 295, 309, 310, 311, 312, 313, 1210.
- before assignment, 337.
- husband need not unite in, when, 310, 313.
- operates to extinguish dower, but passes no interest, 275, 295, 313.
- operates only as to grantee and his privies, 295, 313, 314, 315.
- to third person, not tenant of freehold, void, 331.

[References to sections]

RELEASE—Continued.

- of easement, by deed, extinguishes it, 112, 116.
- of judgment lien, 698, 707.
- of mechanics lien, 728.
- of mortgage, 598, 662.
 - does not discharge mortgage debt, 646.
- of powers, 1210, 1345.
- of rent causes apportionment when, 90.
- of sealed instrument must be under seal, 646.
- of vendor's lien, 683, 686.
- possession in releasee when, 1209, 1211.
- privity of estate when necessary to, 1208, 1209.
- quit claim deed contrasted with, 1211.
- statutory, 1205, 1209, 1211.
- to tenant of freehold, 331, 1207.
- trustee's wife need not unite in deed of, 268.
- words of limitation when necessary to, 159, 1208, 1209.

RELICION,

- apportionment of, 1013.
- nature of, 1010, 1012.
- title by, 1010, 1012, 1013.

RELIEF, INCIDENT TO FEUDAL TENURE, 8.**RELIGIOUS PURPOSES,**

- dedication of land for, 1353.
- See DEDICATION.
- devise for, 1246.
- trust for, 522.

REMAINDER,

- accelerated, when, 783.
- action for waste by him in, 441.

REMAINDER—Continued.

- adverse possession against one entitled by, 1049.
- See ADVERSE POSSESSION.
- after fee simple or fee qualified void, 734, 737.
- after life estate, coupled with full power of disposition, when void, 162, 737, 1328.
- alternative, 737, 784.
- attachment of, 811.
- awaits regular expiration of preceding estate, 734, 795.
- catching bargains with one entitled in, when fraudulent, 1165.
- construed as vested, and not contingent, 734, 744, 746, 749, 751.
- contingent, 738, 740, 741-778.
- See CONTINGENT REMAINDER.
- creditor may subject, when, 805, 811, 693.
- cross, express, 745, 785, 786.
- implied in will, 787, 788.
- shares of survivors in case of, 786.
- curtesy in, 236, 836.
- curtesy barred by interpolated, 236, 237, 273, 276, 277.
- definition of, 732.
- distinguished from reversion, 732.
- dower in, 273, 836.
- dower barred by interpolated, 236, 237, 273, 276, 277.
- effect upon, of illegality of contingency, 793, 794.
- entry for breach of implied condition by him in, 526.
- essential characteristics of, 733-737.
- estate once good as, can never take effect as executory limitation, 822.

[References to sections]

REMAINDER—Continued.

freehold contingent, must be preceded by freehold, 734.
 gap between, and preceding estate,
 destroys, when, 736, 782.
 impossibility of, generally makes vested, 736.
 possibility of, makes contingent, 736.
 grantee in habendum, in addition to grantee in premises, may create, in last named, 1110.
 in chattel, 357, 830.
 in estate for years, 357.
 joint fee in premises reduced by habendum to life estate in one with, to another, 1110.
 judgment lien attaches to, 693.
 liability of, for debts, 693, 805, 811.
 limitations by way of,
 See **LIMITATION**.
 limited on breach of implied condition, good, 302.
 limited on breach of express condition, not good, 734, 795.
 livery of seisin to particular tenant enures to him in, when, 734.
 must vest in right during continuance of preceding estate or the moment it terminates, 736, 790, 795.
 no, after fee simple or fee qualified, 737.
 no contingent freehold, after term for years, 734.
 no, in derogation of preceding estate, 734, 795.
 no, to fail for want of preceding estate, 782.
 not contingent, merely because enjoyment of possession is uncertain, 739.

REMAINDER—Continued.

on a contingency in a double aspect or on a double contingency, 737.
 preceding particular estate,
 at will, not sufficient to support, 734.
 essential to, 734.
 for years cannot be followed by contingent freehold, 734.
 must arise by same instrument and at same time as, 735.
 must be less than fee simple, 734, 737.
 must continue till vesting of, 736, 790.
 must terminate regularly, 734, 795.
 subsequent destruction of, avoids, when, 734, 735, 736, 779, 780-782.
 void in its creation defeats, 735.
 presumed to be vested rather than contingent, 734, 744, 746, 749, 751.
 presumed not to be intended to take effect in derogation of preceding estate, if possible, 795.
 release by him in, 1209.
 release of power to him in, 1345.
 rent may issue out of a, 82.
 to a class of persons, 749.
 to heirs, issue, descendants, etc., 745, 747.
 to heirs, etc., of grantor or testator, a reversion, 750.
 to heirs, etc., with qualifying words, 751.
 to heirs, etc., after preceding freehold in ancestor, 752-758.
 See **RULE IN SHELLEY'S CASE**.
 to one not a party to deed, 1104.
 to "surviving children," etc., 743.

[References to sections]

REMAINDER—Continued.to unbegotten bastard invalid,
793.

transfer of, 802, 803, 804.

vested, 739, 743, 744, 749, 751,
780.See **VESTED REMAINDER**.words construed as importing
time of enjoyment and not
contingency, if possible, 744.**REMOTENESS, LIMITATIONS
VOID FOR,**See **RULE AGAINST PERPETUITIES**.**RENT GRANTED,**

a right to a certain profit, 80.

action of debt for arrears of a
freehold, 79.

annuity distinguished from, 66.

apportionment of, 90.

arrears of, 76, 79.

charged with distress, 85, 86, 87.

definition of, 77.

distress to recover, 85, 86, 87.

estate in, depends on agreement,
88.

in lieu of dower, 332, 348, 350.

in owelty of partition, 963.

less favor shown to, than to rent
reserved, 90.

must issue periodically, 81.

must issue out of lands or ten-
ants corporeal, 82.

nature of, 76, 77, 79, 80.

not a return for land, usually,
83, 84.prohibition to prevent justice of
peace from assuming cogni-
zance of freehold, 79.

seck, 85, 86, 87.

tax upon, a tax upon land, 79.

transaction not good as a, may
be good as a contract, 77.**RENT RESERVED,**See **LANDLORD AND TENANT**.acceptance of, creates estate
from year to year, 389, 390.

action of debt for arrears of, 79.

apportionment of, 46, 90, 221,
411, 412.

arrears of, 76, 79, 410.

assignee of lease liable for, 412,
1227.

assignment of, 407.

assignment of remedies for, 407.

assignment of reversion car-
ries, 407, 412.

by joint tenants, 409, 886.

cannot issue out of personality,
82, 84.cannot issue out of incorporeal
property, 82.

charged with distress, 85, 86, 87.

covenant for re-entry for default
in payment of, 418.

covenant to pay, 412, 415.

See **COVENANT**.

curtesy in, 236, 251.

seisin in law sufficient for,
when, 231.death of lessor or lessee between
rent days, 221, 411.

definition of, 77.

destruction of land or buildings
affects, 412, 415.doctrine of occupancy applied
to, 202, 203.

dower in, 251, 273, 289.

widow to elect between dower
in land or, 289.

due when, 221, 408, 411, 412.

estate in, measured by tenant's
estate in land leased, 88.eviction of tenant affects, 412,
419.See **EVICION**.

[References to sections]

RENT RESERVED—Continued.

exception, in lease, of land or growths thereon not a, 80.
 extinguished when, 412, 415, 419.
 fee farm, 88.
 freehold, sued for, 79.
 ground, 88, 89.
 in arrear to whom payable, 90, 221, 410, 411, 412.
 in reddendum clause of lease, 1112.
 incident to estate at will, 384, 385.
 incident to estate by sufferance, 389.
 incident to reversion, 808.
 increase of, upon tenant's transfer, makes transfer a sublease, not an assignment, 421, 1224.
 maximum estate in, 89.
 may issue out of remainder or reversion, 82.
 must be a right to certain profit, 77, 80.
 must issue out of lands or tenements corporeal, 77, 82.
 must issue in return for land that passes, 77, 83, 84.
 must issue periodically during term, 81.
 non payment of, forfeits tenant's estate when, 526.
 payable on leased premises, 408.
 payable to him who has reversion, 409, 412.
 payable to lessor and his heirs, not to third person, 83, 406, 409.
 payable to lessor alone, creates life estate, in, 409.
 payable to one of several joint tenants, 409.
 payable to wrong person, 409.
 payable when, 408.

RENT RESERVED—Continued.

re-entry for breach of condition to pay, 539.
 relief in equity against forfeiture for nonpayment of, 539, 592.
 rent seck, not charged with distress, 85, 86, 87.
 rent service, 85, 86, 87, 89.
 several meanings of rent, 76.
 several premises embraced by one lease, 405.
 sublease of dead life tenant to pay, when, 46, 90, 221, 411.
 surrender by tenant of premises to landlord affects, 412.
 tax upon, a tax on land, 79.
 tenant entitled to emblements must pay, for premises planted, 44.
 transaction not good as a, may be good as a contract, 77, 83, 84.
 widow's right to, for premises occupied as her quarantine, 338.

RENTS AND PROFITS,

accounting for, in action of ejectment, 389.
 accounting for, in foreclosure proceedings, 621, 631, 635.
 accounting for, in partition suit, 962.
 cestui que trust entitled to, 487.
 coparceners liable to each other for, when, 939.
 for five years, applied to satisfy, judgment lien, 699.
 joint tenants liable to each other for, when, 891.
 mortgagee liable for, 621.
 mortgagee's agreement to set, against interest, 621.

[References to sections]

RENTS AND PROFITS—Cont'd.

- mortgagor's liability for, 631, 635.
- of equitable separate estate usually personalty, 1080.
- of estate by sufferance, recoverable as damages, in ejectment, 389.
- tenants in common liable to each other for, when, 922.

REPAIR,

- covenant to, 216, 416.
 - to keep in good, 416.
 - to leave in good, 416.
 - to return in good, 416.
 - to surrender in good, 416.
- estovers for purposes of, 41.
- lessor, in absence of covenant, not bound to, 401, 416.
- tenant, in absence of covenant, not bound to, save to prevent waste, 216, 374, 390, 401, 416, 426, 433.
- See WASTE; LANDLORD AND TENANT.
- tenant not entitled to compensation for making, 216.

REPOSITORY OF UNRECORDED DEEDS IN CLERK'S OFFICE, 1392.**REPRESENTATIONS, TITLE BY ESTOPPEL ARISING FROM, 1350, 1351.**

See ESTOPPEL.

REPUBLICATION OF WILL, 1275-1277.

See WILL.

REPUDIATION OF INFANTS' CONVEYANCE, 1074.

See CAPACITY.

REPUGNANCY,

- between premises and habendum, 1110.
- between provisions in will.
- condition void for, 578-590, 794.
- in restraint of alienation, 579-588.
- restricting liability of premises granted for debts, 589.
- restricting use of premises granted, 590.

RESALE OF DELINQUENT LAND BY STATE, 1374, 1375.

- application for, filed with clerk, 1374.
- clerk compelled to issue tax deed upon, 1374.
- notice of application published, 1374, 1375.
- parties to application for, 1374.
- purchaser forfeits all rights, if no tax deed issued, 1374.
- redemption money, and to whom payable, 1374.
- substantial compliance with statute required, 1375.
- surveyor's report, 1374.
- time for redemption, 1374.

RESCISSION,

- distinction between fraud that is ground for, and that which is ground for specific performance, 1305.
- mistake, when ground for, 1184, 1186-1188, 1307-1309.
- See MISTAKE.

RESERVATION,

- contrasted with exception, 101.
- defined, 101.
- easement arising by, 101, 105, 127.

[References to sections]

RESERVATION—Continued.

easement arising by implied, 105, 127.

fixtures severed by, upon transfer of land, become personalty, 36.

fructus naturales severed by, becomes personalty, 42.

life estate arising by, 199.

of rent,

See RENT RESERVED.

of title in vendor, 472, 617, 688.

contrasted with vendor's lien, 472, 617, 688.

superior to vendor's lien because aided by legal title, 688.

of vendor's lien, 682.

words of limitation necessary to for estate of inheritance, 153, 160.

RESIDUARY DEVISE,

effect of lapse upon, 1280.

See LAPSED DEVISE; WILL.

RESTRAINT OF ALIENATION, CONDITION IN, 579-588.**RESTRAINT OF MARRIAGE, CONDITION IN,** 570-577.**RESTRAINT OF TRADE, CONDITION IN,** 569.

See CONDITION.

RESULTING TRUST, 467, 468-473.

See TRUST; TRUSTEE.

priority between creditor and one claiming debtor's land by, 1404.

RETURN,

by treasurer of list of delinquent

RETURN—Continued.

lands entered in "delinquent tax book," 1362.

by treasurer of sales of delinquent lands entered in "delinquent land book," 1373.

REVERSION,

adverse possession against one in, 1049.

after fee tail, 176, 177.

always vested, 807.

arises by act of law, 807.

assignee of, to sue and be sued upon covenants, 424, 1227.

catching bargain with one in, when fraudulent, 1165.

covenants running with, 424, 1227.

creditor may subject, 811.

curtesy in, 236.

distinguishment from remainder, 732, 807, 809-811.

distress lies for rent where lessor has, 86, 87.

dower in, 273, 274, 289.

fealty incident to, 808.

lease requires, in grantor, 1200.

See LEASE; LANDLORD AND TENANT.

liability of, for grantor's debts, 811.

merger of particular estate in, 812-818.

See MERGER.

nature of, 807.

prescriptive title as against one in, 1066.

See PRESCRIPTION.

quasi, 171, 807, 819.

See REVERTER; POSSIBILITY OF REVERTER.

re-entry for condition broken passes with, 535, 536.

See CONDITION.

[References to sections]

REVERSION—Continued.

release of power to one in, 1345.

See **POWER**.

remainder to grantor's or testator's heirs, is a, 750.

rent follows, 406, 407, 409, 412.

rent incident to, 808.

rent may issue out of a, 82.

rent reserved by one in, is a rent service, 86.

See **RENT RESERVED**.

sale of dry, to satisfy judgment, 699.

REVERTER,

possibility of, after fee conditional, 175, 807, 819.

possibility of, after fee qualified, 171, 807, 819.

possibility of, after fee upon condition, 171, 807, 819.

possibility of, assignable, 537, 819.

right of, in dedicator upon abandonment of public easement, 1355.

rule against perpetuities applied to possibility of, 819.

such possibilities and rights always contingent, 819.

REVOCATION,

of license, 136, 137.

of offer to dedicate, 1355.

of power of attorney, 1105.

of will, 1239, 1264-1276.

See **WILL**.

revival of revoked will, 1275-1277.

of will in exercise of power of appointment, 1333.

power of, in a conveyance, 1327.

See **POWER**.**RIPARIAN OWNER**,See **WATER RIGHTS**.**RIVER**,See **WATER RIGHTS**.**ROAD**,See **EASEMENT**; **HIGHWAY**; **WAY**.**RULE AGAINST PERPETUITIES**,

applied to alternative limitations, 851.

applied to appointment under a power, 1325.

applied to contingent limitations only, 844, 845, 848.

applied to contingent remainders, 792.

applied to limitation to a class, 853.

applied to limitation upon an indefinite failure of heirs, etc., 854-857, 867-874.

applied to limitation upon a dying without heirs, etc., 856, 857, 867-874.

applied to possibilities of reverter, 819.

applied to powers of appointment, 1325, 1326.

applied to shifting limitations, 851, 852, 854-857, 869, 870, 871, 873, 874.

applied to springing limitations, 846, 847, 850, 853.

circumstances at time of testator's death determine application of, 850.

considerations leading to adoption of period prescribed by, 849.

effect of remoteness under, 851.
failure of one of several limitations under, does not affect validity of those that do vest, 848.

[References to sections]

RULE AGAINST PERPETUITIES—Continued.

gestation included in "life in being," 846.
 improbability that limitation will take effect beyond period of, immaterial, 847.
 limitation to posthumous son of posthumous son within, 846.
 limitation too remote, to be separated into two contingencies when, 852.
 meaning of "life in being" within, 846.
 necessity for some, 843.
 period prescribed by, 845.
 adopted from marriage settlement, 849.
 estimated from what date, 850.
 precise terms of, 844.
 probability that limitation will never vest immaterial, 847.
 separation of contingencies, to uphold limitation under, 852.
 subsequent change of circumstances immaterial, 850.
 two periods of gestation may be included, 846.
 ulterior limitations may be valid though following after others too remote, 851.

RULE IN DUMPOR'S CASE, 417, 559.

RULE IN MAY v. JOYNES, 162, 200, 1328.

RULE IN SHELLEY'S CASE, abolished in Virginia, 778.

applied in wills, 776.
 applied to executed trusts, 777.
 applied to executory trusts, 777.
 applied to personal property, 775.
 both estates legal, or both equitable, 757.

RULE IN SHELLEY'S CASE—

Continued.
 circumstances necessary for, 754-758.
 "heir," etc., must be used in technical sense, 758.
 "heirs," etc., named under power of appointment, 1329.
 instances of application of, 765-777.
 limitation to "heirs," etc., must be such as would ordinarily create contingent remainder, 755.
 limitation must be to "heirs," etc., of preceding tenant and of none other, 756.
 not applicable to executory limitations, 837.
 policy of, 759.
 precise terms of, 753.
 reasons for, 760-764.

SALE,

account filed of, by trustee, 508, 669.
 at auction, 666, 1289, 1305, 1368.
 See AUCTION.
 by trustee under deed of trust, 506-508, 666-669.
 See DEED OF TRUST; MORTGAGE.
 chattel annexed to land passes on, of land, 36.
 conditional, 605-609.
 equitable title to land by,
 See CONTRACT TO CONVEY; SPECIFIC PERFORMANCE.
 fructus naturales pass on, of land, 40.
 fructus naturales severed from land by, become personalty, 42.
 judicial, 635-637, 1300.

[References to sections]

SALE—Continued.

- mistake as to quantity of land, affects, 1308, 1309.
- mortgage distinguished from conditional, 605-609.
- of chattels on land implies license to enter and remove them, 137.
- See LICENSE.
- of contingent interests, 500.
- of fixture operates a severance from land, 36.
- of growing crop, a sale of personality when, 43, 1286.
- of growing trees, etc., a sale of land when, 42, 1286.
- of infant's land, 1074, 1075.
- of insane person's land, 1073.
- of land,
 - by the acre, 1308, 1309.
 - carries growing crop, though mature, 43.
 - for taxes,
 - See TAX SALE.
 - in gross, 1308, 1309.
 - in partition suit, 963.
 - on which license to be exercised revokes license, 136.
 - under decree to satisfy judgment, 699.
- of servient tract to purchaser without notice extinguishes easement, 117.
- of trust subject under decree of court, 500.
- power of,
 - See POWER.
- carries power to make conveyance, 1321.
- does not authorize exchange, 1321.
- does not authorize mortgage, 1321.
- extinguished when, 1322, 1342.

SALE—Continued.

- implied when, 1328.
- in joint executors, 1332.
- in joint trustees, 1332.
- in life tenant, 162, 1335.
- reserved to mortgagee, 611, 612.
- statutory, 1324.
- to pay debts not to be exercised if no debts, 1322.
- quasi easements converted into easements by,
 - of dominant tract, 104.
 - of servient tract, 107.
- tenant cannot cut timber on leased premises for, 41.

SAND, AS PROFIT A PRENDRE, 73, 74.**SATISFACTION**,

- of deed of trust or mortgage, 598, 626, 639, 662.
- of judgment lien, 708.
- of mechanics lien, 727, 728.
- of vendor's lien, 686.
- presumed after twenty years, 620, 626, 639, 687.

SCHOOL, DEDICATION OF LAND FOR, 1353-1355.

See DEDICATION.

SCINTILLA JURIS, 452.**SCROLL AFFIXED BY WAY OF SEAL**, 1139.

See SEAL.

SCUTAGE, 6.**SEAL**,

- acknowledgment under official, when, 1397.
- authority of agent to execute instrument under, must be under, when, 1105.
- See POWER OF ATTORNEY.

[References to sections]

SEAL—Continued.

authority of real estate agent
 need not be under, 1105.
 breaking off or defacing, 1193.
 corporation's seal, 1139.
 nature of, 1138, 1139.
 necessary to a deed, 1102, 1137,
 necessary to a tax deed, 1382.
 not necessary to a will, 1252.
 origin of, 1136.
 power calling for writing under,
 no delivery necessary, 1333.
 release of instrument under,
 must be under, 646.
 scroll equivalent to, when, 1139.

SEISIN,

actual, 141, 229, 1123.
 constructive, 141, 229, 1123.
 covenant of,
 broken, if at all, as soon as
 made, 1123.
 embraces constructive, as well
 as actual, 1123.
 measure of damages for
 breach of, 1123, 1132.
 nearly equivalent to covenant
 of right and power to con-
 vey, 1124.
 not broken by existence of
 liens, 1123.
 recovery upon, bars dower,
 295, 314.
 destruction of, or disseisin.
 See DISSEISIN; ADVERSE POSSES-
 SION.
 distinguished from right of en-
 try or action, 141, 229.
 husband's, for dower, 265-271.
 See DOWER.
 in fact or in deed, 141, 229.
 usually necessary for curtesy,
 230.
 in law, 141, 229.

2 Min. Real Prop—49**SEISIN**—Continued.

sufficient for dower, 265.
 when sufficient for curtesy, 231.
 livery of, 142, 143, 144.
 See LIVERY OF SEISIN.
 meaning and nature of, 139, 140.
 of donee of power defeated by
 its exercise, 1329.
 of freehold estate only, 140, 357,
 360.
 See FREEHOLD.
 of incorporeal property, 141, 231.
 principles of, not applicable to
 equitable estates, 483.
 to use of another, 452.
 See USE; STATUTE OF USES;
 TRUST.
 wife's sole, for curtesy, 233.
 wife's unlawful, affects curtesy,
 235.
 See CURTESY.

**SENILITY, EFFECT OF, UPON
A WILL, 1242.**

See WILL.

**SEPARATE ESTATE OF MAR-
RIED WOMAN,**

equitable,
 See EQUITABLE SEPARATE ES-
 TATE.
 alienation of, may be re-
 strained, 582, 1080.
 chargeable with debts, 1080.
 contract to convey, 1081.
 conveyance of, independently
 of statute, 1080.
 conveyance of, under Virginia
 statute, 1081.
 conveyance to be recorded as
 to husband and wife, 312,
 1081.
 creature of equity, 1080.
 curtesy in, 240.

[References to sections]

SEPARATE ESTATE OF MARRIED WOMAN—Continued.

- disability of coverture alone obviated by statute, 311, 1081.
- husband and wife both to unite in conveyance of, 1081.
- may be conveyed to husband direct, 1080.
- powers of attorney with respect to, 1081.
- statute to be substantially followed, 1081.
- statutory,
 - conveyance of, 309, 310, 1082.
 - curtesy in, 234, 241, 1082.
 - curtesy initiate in, 244.
 - dower is, when, 295, 310, 1082.
 - husband not barred of curtesy if he do not unite in wife's deed, 1082.
 - whether wife's estate is equitable or statutory, how determined, 1082.

SERVIENT TRACT,

See EASEMENT; PROFIT A PRENDRE; COMMON.

SEVERANCE,

- of fructus industriales from land, 43.
- of fixtures from land, 36.
 - accidental, 36.
 - actual, 36.
 - constructive, 36.
- of fructus naturales from land, 42.
 - actual or constructive, 42.

SHELLEY'S CASE, RULE IN,

See RULE IN SHELLEY'S CASE.

SIGNATURE,

- cancellation or destruction of testator's, revokes will when, 1269.

SIGNATURE—Continued.

- mere, by one of several joint grantors not sufficient, 1109.
- necessity of, for deed, 1137.
- of attesting witness to deed, as proof of delivery, 1142.
- of attesting witness to will, made by another for him, when, sufficient, 1262.
- made in testator's presence, 1263.
- meaning of "testator's presence," 1263.
- must appear at end of will, 1254.
- need not be made in presence of other witnesses, 1261.
- witness' mark a sufficient, 1262.
- of husband as well as wife, when necessary to wife's conveyance, 311, 1081, 1082.
- of testator under statute of wills, 1252, 1254.
- of vendor or his agent, or of vendee, under statute of Frauds, 1289.

SOCAGE,

- military tenure converted into, 14.
- tenure in free and common, 6, 14.
- tenure in villein, 6.

SPECIAL LIMITATION,

- distinguished from condition subsequent, 169, 204, 540, 574, 586, 589.
- distinguished from conditional limitation, 540, 541.
- fee qualified, an estate upon, 169.
- life estate may be an estate upon, 204.
- marks utmost limit of estate, and does not terminate it prematurely, 540, 574, 586, 589.

[References to sections]

SPECIAL LIMITATION — Continued.

restraining alienation, 586.
 restraining marriage, 574.
 restraining subjection of land to debts, 589.

SPECIFIC PERFORMANCE,

of contract to convey land, 1279-1314.

wherein wife has not united, 318.

See **CONTRACT TO CONVEY.**

of contract to devise land, 1284.

of contract to lease land, 363.

of covenant for further assurances, 1127.

requisites for,

contract must be in writing, 1287, 1288.

except in case of fraud, 1291.

and in case of part performance, 1292-1297.

See **PART PERFORMANCE.**

and in case of deposit of title deeds, 1299.

and in case of judicial sales, 1300.

and in case of answer confessing contract, 1298.

contract must be signed by party to be charged or his agent, 1289.

contract must be certain and definite, 1302.

contract must be equal and fair, 1303.

contract must be mutually obligatory, 1304.

contract must be free from fraud, 1305.

contract must be free from material mistake or misdescription, 1306-1309.

See **MISTAKE.**

SPECIFIC PERFORMANCE —

Continued.

contract must be supported by adequate consideration, 1310-1313.

See **CONSIDERATION.**

contract must be legal, binding party to do only what he may lawfully do, 1314.

SPENDTHRIFT TRUST, 484, 589.**SPOILIATION,**

See **ALTERATION.**

SPRING, CUTTING OFF PERCOLATING WATER FROM, 62.

See **WATER RIGHTS.**

STATE,

as purchaser at tax sale, 1372.

resale of delinquent land by, 1374, 1375.

See **TAX SALE; RESALE.**

STATUTE DE DONIS CONDITIONALIBUS,

annuities and corodies not within, 66.

applies only to lands and tenements, 176, 177, 178.

fee conditional converted into fee tail by, 176, 177.

substance of, 176.

three estates created by, 176.

STATUTE OF CONVEYANCES,

See **STATUTE OF FRAUDS.**

STATUTE OF DESCENTS, 990-1002.

See **DESCENT; HEIRS.**

alienage of heir or ancestor under, 1001, 1002.

[References to sections]

STATUTE OF DESCENTS—

Continued.

order of succession under, 992-994.

origin and history of, 990.

shares of heirs under, 995-999.

subject matter of descent under, 991.

who are heirs under, 992-999.

STATUTE OF FRAUDS,

applies to contracts to convey or lease land, 1100, 1101.

applies to conveyance of land, 378, 390, 1100, 1101.

applies to conveyance by one in adverse possession, 1030.

See ADVERSE POSSESSION.

applies to conveyance by one co-parcener to another, 940.

applies to conveyance by one joint tenant to another, 888.

applies to conveyance by tenants in common to each other, 926.

applies to leases, when, 362, 363, 369, 1100, 1101.

applies to mortgage implied from deposit of title deeds, 615, 616.

applies to oral compromise of boundary line, 1036.

applies to oral grant of easement, 100.

applies to transfer of real fixtures, 36.

applies to transfer of fructus naturales, 42, 1286.

applies to voluntary partition between co-parceners. 946.

between joint tenants. 901, 902.

between tenants in common, 926.

assignment of dower not within, 347.

conveyance or lease invalid

STATUTE OF FRAUDS—Continued.

under, may create estate at will, or from year to year, 378-390.

dedication not within, 1354.

license not within, 134.

purchase of burial lot not within, 130.

specific performance of contract within,

See SPECIFIC PERFORMANCE.

voluntary partition not within, when, 946.

STATUTE OF FUTURE GRANTS,

abeyance of freehold permitted under, 146.

appointee under power, though not within consideration, may take under, 1329.

curative effect of, 1235, 1236.

executory limitations arising under, 823.

See EXECUTORY LIMITATION.

power taking effect under, 1325.

See POWER.

terms of, 823.

STATUTE OF GRANTS,

land may perhaps be acquired by prescription under, 1057.

terms of, 142.

STATUTE OF LIMITATIONS,

See ADVERSE POSSESSION.

a source of legal title, 1021.

acknowledgment of claimant's title stops running of, 1040.

adverse possession under, 1025-1048.

applied as between landlord and tenant, when, 1033, 1039.

applied in equity, 1051-1053.

[References to sections]

STATUTE OF LIMITATIONS

—Continued.

- applied to commonwealth's grants, 1051.
- applied to deeds of trust, 626, 639.
- applied to voluntary conveyances, 1053.
- applied to mechanics lien, 725.
- applied to mortgages, 626, 639.
- applied to trusts, 1052.
- applied to vendor's lien, 626, 687.
- applied to fraudulent conveyances, 1051, 1053.
- continual claim as prolonging period of, 1018.
- debt barred by, does not discharge mortgage, 626, 639.
- debt barred by, does not discharge vendor's lien, 687.
- disabilities of claimant as prolonging period of, 1022, 1023.
- disability of one cotenant does not enure to others, 1022.
- infancy prolongs period of, 1022.
- infants' repudiation of conveyance must occur within period of, 1074.
- insanity prolongs period of, 1022.
- nature of claimant's entry to stop running of, 1050.
- new right or title acquired by claimant, 1049.
- nullo tempus occurrit regi, 1024.
- origin of, as applied to land, 1017.
- period prescribed by, 1020, 1022.
- runs not against State or municipal corporation, 1024.
- runs not against widow, before dower assigned, 337.
- tacking of disabilities of claimants, 1023.

STATUTE OF LIMITATIONS

—Continued.

- tacking of possessions of occupants, 1028-1031.

STATUTE OF MORTMAIN,

1090-1095.

See CORPORATION.

- annuities and corodies not within, 66.

STATUTE OF PAROL AGREEMENTS,

See STATUTE OF FRAUDS.

STATUTE OF PRETENSED TITLES, 1071.**STATUTE OF QUIA EMP-TORES,** 5, 12, 89, 162.**STATUTE OF REGISTRY,**

See RECORDATION; REGISTRY.

STATUTE OF USES,

- abeyance of freehold under, 146.
- alien seised to use under, 452.
- bargain and sale under, 451, 456, 466.
- See BARGAIN AND SALE.
- circumstances necessary to operation of, 452-454, 456.
- converts use into legal title, 451, 455.
- conveyance by husband to wife under, 453.
- conveyances under, 451, 456.
- covenant to stand seised under, 451, 456, 466.
- See COVENANT TO STAND SEIZED.
- devise to uses under, 451, 456, 466.
- disseisor seised to use under, 452.
- estate conveyed under, 452.
- executes use, when, 451, 453, 455, 462-465.

[References to sections]

STATUTE OF USES—Continued.

executory limitations arising under, 823.

See EXECUTORY LIMITATION.

feoffment to uses under, 450, 451, 466.

gist of, 451-454, 455, 456, 1230.

lease and release under, 455, 456, 466.

power of appointment under, 1325.

See POWER.

power of revocation under, 1327.

seisin to use under, 452.

tenant for years cannot be seised to use, 465.

uses unexecuted by, are direct trusts, 460-466.

STATUTE OF WILLS,

See WILLS; EXECUTORY LIMITATION.

abeyance of freehold permitted under, 146.

executory limitations arising under, 823.

formalities of wills required by, 1250-1263.

power of appointment, under, 1325.

See POWER.

power of revocation under, 1327.

power of sale under,

See SALE.

revocation of will under, 1239, 1264-1274, 1276.

STATUTORY POWER, 666, 1324.

See POWER.

STIPULATED DAMAGES, NOT A PENALTY, 594.**STOCKHOLDER'S INTEREST IN CORPORATION LAND IS PERSONALTY, 22.****STRANGER,**

alteration of instrument by, 1191, condition not to be performed by, 545.

delivery of deed to, 1141.

delivery of deed in escrow to, 1141.

lessee's obligation to, 395-398.

lessor's obligation to, 394.

limitation in deed to, not a party thereto, 1104.

redemption of land from mortgage by, 545, 621.

redemption of land from tax sale by, 1376.

tenant liable for waste by, 433.

STREAM, RIGHTS IN,

See WATER RIGHTS.

STREET,

condemnation of,

See CONDEMNATION.

dedication of, 1353-1355.

See DEDICATION.

description of lots by reference to, 1152.

See DESCRIPTION.

vendor estopped to prevent vendee from using, described as bounding lot sold, 109.

See ESTOPPEL.

SUBCONTRACTOR,

defined, 714.

liability of owner of premises to, 721, 722.

lien of, 718-720.

See MECHANICS LIEN.

SUBINFENDATION, 5, 162.

[References to sections]

SUBLESSEE,

covenants do not run in favor of, or against, 422.

See COVENANT.

distinguished from assignee, 420, 422.

emblems in favor of life tenant's, 44, 46, 49.

See EMBLEMENTS.

not in privity with lessor, 420, 422.

of estate at will, 380.

of estate by sufferance, 387.

of estate for life, 44.

of estate for years, 371.

SUBROGATION,

of purchaser paying off mortgage to rights of mortgagee, 647, 648.

of purchaser paying off vendor's lien to rights of vendor, 685.

of sureties to judgment lien, 707.

surety paying debt entitled to, against unrecorded deed, 1404.

SUBSEQUENT LEGITIMATION OF BASTARD,

See BASTARD.

effect of, upon curtesy, 242.

effect of, upon descent, 997, 998.

SUBSEQUENT PURCHASER,

See PURCHASER; COMPLETE PURCHASER; ASSIGNEE.

SUBSTITUTION OF TRUSTEE,

500, 517-519, 674, 675.

See TRUST; TRUSTEE.

SUBTERRANEAN STREAM, RIGHTS IN,

See WATER RIGHTS.

SUPPLY LIEN, 729.**SUPPORT,**

grant "for, of oneself and children," a fee simple in first named, 183.

of buildings,

by land, 123.

by other buildings, 107, 123.

not subject of prescription, 1066.

of land,

acquired by natural right, 99, 122.

by adjacent land, 122.

by subjacent land, 122.

See EASEMENT.

power to be exercised for, cannot be exercised till necessity arises, 1322.

ceases on death of person supported, 1342.

trusts of maintenance and, 484.

vendor's lien to secure consideration involving, 681.

SURETY,

covenantor becomes, upon assignment, 423.

mortgagor becomes, where purchaser of mortgaged land assumes mortgage, 647, 648.

subrogation of, 707, 1404.

See SUBROGATION.

SURFACE WATER,

See WATER RIGHTS.

contrasted with water running in defined channel, 128.

drainage of, a natural easement, 99, 128, 129.

See EASEMENT.

drip from eaves of house, 129.

lower proprietor not entitled to unobstructed flow of, 128.

[References to sections]

SURFACE WATER—Continued.

- lower proprietor's right to throw back, upon upper land, 128.
- civil law rule, 128.
- common law rule, in Virginia, 128.
- in case flow of, is aided by ditches, etc., 128.
- upper proprietor must not pollute, 128.

SURPLUS, AFTER SATISFYING LIEN,

- See **EQUITY OF REDEMPTION**.
- dower in, 285-287.
- judgment lien attaches to, 693

SURRENDER,

- a secondary conveyance at common law, 1197, 1204.
- apportionment of rent upon a, 412.
- See **RENT**.
- conditions cease to operate upon, 1219.
- contrasted with release, 1212.
- covenants broken not discharged by, 1219.
- covenants cease to operate upon, 1219.
- deed required for, when, 1217.
- definition of, 1212.
- effect of, on tenant's estoppel to deny landlord's title, 402.
- See **LANDLORD AND TENANT; ESTOPPEL**.
- grant by way of, suffices, 1216.
- in law, 1218.
- invalid, may take effect as a grant, 1217.
- livery of seisin not essential to, 1216.
- merger, as result of, 1214, 1219.
- See **MERGER**.

SURRENDER—Continued.

- privity of estate necessary to, 1215.
- surrenderee must be the immediate remainderman or reversioner, 1214.
- surrenderor must be in possession, 1213.
- to one joint tenant enures to all, 887.

SURVIVORSHIP,

- between joint devisees, in case of lapse, 1278, 1279.
- between joint tenants, 892, 893.
- curtesy affected by, 233.
- dower affected by, 270.
- between joint trustees or executors, 519, 674, 675, 893.
- power affected by, 1332.
- between tenants by entireties, 909.
- executory limitation dependent upon, 825.
- no, between coparceners, 934.
- no, between tenants in common, 925.
- remainders dependent upon, 743, 745.
- See **REMAINDER**.

SUSPENSION,

- See **EXTINGUISHMENT**.
- of easement, 115.
- See **EASEMENT**.
- of powers, 1344.
- See **POWER**.
- of rent, 412, 415, 419.
- See **RENT**.

TACKING,

- by way of mortgage to secure future advances, 624.
- of debts to mortgage as condition of redemption, 622, 623.

[References to sections]

TACKING—Continued.

- of disabilities in adverse possession, 1023.
- of disabilities in prescription, 1058, 1059.
- of possessions in adverse possession, 1028-1031.
- of third to first mortgage, so as to squeeze out second, 657.

TALTARUM'S CASE, FEE TAIL FIRST BARRED IN, 188.**TAXATION, DUE PROCESS OF LAW FOR, 1358, 1359, 1386, 1387.**

- levy of tax in, 1358, 1359, 1386, 1387.
- listing land for, 1358, 1359, 1386, 1387.
- valuation for, 1358, 1359, 1386, 1387.

TAXES,

- covenant to pay, runs with land, 421.
- current delinquent, recorded in treasurer's office, 1392.
- land delinquent for, recorded in "delinquent tax book" in clerk's office, 1362.
- land sold for, recorded in "delinquent land book" in clerk's office, 1373.
- levy of, 1358, 1359, 1386, 1387.
- lien on land for, 1357.
- lien of, recorded as to purchasers and creditors, 1390, 1392.
- life tenant's duty to pay, 219.
- listing of land for, 1358, 1359, 1386, 1387.
- mortgagee credited with, 621.
- purchaser of land for,
See PURCHASER; TAX SALE.

TAXES—Continued.

- sale of land for illegal or excessive, 1366, 1386.
- See TAX SALE.
- upon rent are, upon land, 79.
- valuation of land for, 1358, 1359, 1386, 1387.

TAX DEED,

- actual sale not established by, 1387.
- annulment of sale must be within two years after, 1386.
- bona fide sale not established by, 1387.
- clerk executes, 1382, 1367.
- confers legal title, 1381, 1385.
- confirmation of sale to be recited in, 1373, 1383.
- curative effect of, 1386, 1387.
- execution of, at time and by person appointed, 1381, 1382.
- formalities of, 1382.
- fraud in sale shown despite, 1387.
- fraud prolongs period for annulment of, 1386.
- fraudulent, is void, 1382.
- land not chargeable with taxes may be shown despite, 1386.
- levy of tax not established by, 1386.
- levy of tax to be recited in, 1359, 1383.
- listing of land not established by, 1386.
- listing of land to be recited in, 1359, 1383.
- notice of sale not established by, 1386.
- notice of sale to be recited in, 1363, 1373, 1383.
- omission of required recitals avoids, 1383.

[References to sections]

TAX DEED—Continued.

payment of tax may be shown despite, 1386.
 prima facie evidence of all steps, 1386.
 publicity of sale not established by, 1387.
 purchaser's right to compel execution of, 1374, 1381.
 recitals to be contained in, 1383.
 recordation of, necessary even as between the parties, 1384.
 redemption may be shown despite, 1386.
 requisites of, 1382, 1383.
 sale at right time and place not established by, 1387.
 seal required for, when, 1382.
 special warranty contained in, 1382.
 surveyor's report to be recited in, 1374, 1383.
 title conferred on purchaser by, 1385.
 treasurer's report of sales to be recited in, 1373, 1383.
 unconstitutionality of tax law may be shown despite, 1386.
 valuation of land for taxation not established by, 1386.
 valuation of land to be recited in, 1383, 1359.

TAX SALE,

actual, necessary, 1358, 1387.
 amount to be paid in redemption from, 1379, 1374.
 confirmation of, by court, 1362.
 deed to purchaser at,
 See **TAX DEED**.
 due process of law for, 1358, 1359.
 follows assessment list, 1365.
 for excessive or illegal tax, 1366.

TAX SALE—Continued.

forfeiture theory of, 1357.
 fraud avoids, when, 1358, 1387.
 illegalities in, cured by tax deed when, 1386, 1387.
 See **TAX DEED**.
 levy of tax, a condition precedent to, 1358, 1359.
 lien theory of, prevails in Virginia, 1357.
 listing of land, a condition precedent to, 1358, 1359.
 notice of, necessary, 1358, 1363, 1383, 1386, 1374.
 period allowed to redeem, 1378, 1374.
 place of, 1364, 1387.
 posting of delinquent list as preliminary to, 1363.
 primary liability of personalty, 1361.
 public, 1358, 1387.
 purchaser at, 1369-1372.
 See **PURCHASER**.
 quantity of land to be sold under, 1365.
 recorded in delinquent tax book, 1362.
 recorded in delinquent land book, 1373.
 redemption from, 1376-1380.
 relief against erroneous assessment, 1360.
 resale by State, 1374, 1375.
 See **RESALE**.
 statute shortening period of redemption from, 1380.
 statute lengthening period of redemption from, 1380.
 terms of, 1368.
 time of, 1364.
 to whom redemption money payable, 1377.

[References to sections]

TAX SALE—Continued.

- treasurer's return of delinquent list, 1362.
- treasurer's return of sales, 1373.
- treasurer to make, 1367.
- who may redeem from, 1376.

TENANT,

- attornment of, 4.
- under feudal system, 1-16.
- See LANDLORD AND TENANT.

TENANT AT WILL,

- See ESTATE AT WILL.
- annexation of fixture by, presumed not permanent, 37.
- See FIXTURE.
- entitled to emblements, 44, 46.
- See EMBLEMENTS.
- fixture removable by, when, 37.

TENANT BY ENTIRETIES,

- See ESTATE BY ENTIRETIES.

TENANT BY SUFFERANCE,

- See ESTATE BY SUFFERANCE.
- not entitled to emblements, 44.

TENANT FOR LIFE,

- See LIFE ESTATE.
- acceptance of new lease by, a surrender in law of old one, when, 1218.
- apportionment of rent upon death of landlord who is, 411.
- See RENT.
- cannot be purchaser at tax sale, 1369.
- confirmation by reversioner of lease by, 1220.
- disseised, cannot surrender to reversioner before re-entry, 1213.
- duties of, 205.
- emblements for, when, 44, 46, 48.
- See EMBLEMENTS.

TENANT FOR LIFE—Cont'd.

- estovers for, when, 41, 429.
 - See ESTOVERS.
 - fixtures removable by, when, 38.
 - See FIXTURE.
 - license by, to lessor to enter for specific purpose not a surrender, 1218.
 - one having power to divide among a class may make one a, with remainder to others, 1319.
 - power of, to lease or mortgage extinguished by transfer of his own estate, 1344.
 - power to lease or sell conferred upon, 1317.
 - See POWER.
 - reversioner of, cannot release to sublessee of, but may confirm, 1221.
 - rights of, in general, 205.
 - with unlimited power of disposition, becomes fee simple owner, 162, 200, 1328.
- TENANT FOR YEARS,**
- See ESTATE FOR YEARS; LANDLORD AND TENANT; LEASE.
 - acceptance of new lease by, a surrender in law of old one, when, 1218.
 - cannot surrender before entry, 1213, 1214.
 - See SURRENDER.
 - confirmation may enlarge estate of, 1220.
 - emblements for, when, 44, 46, 47.
 - See EMBLEMENTS.
 - fixtures removable by, when, 37.
 - See FIXTURES.
 - license by, to lessor to enter for

[References to sections]

TENANT FOR YEARS—Continued.

specific purposes, not a surrender, 1218.

may surrender to reversioner for years, 1214.

no release to, by way of passing a right, 1207.

ousted, cannot surrender to lessor before re-entry, 1213.

power to lease or sell conferred upon, 1317.

See **POWER**.

release to, by way of enlargement, 1209.

See **RELEASE**.

TENANT FROM YEAR TO YEAR,

See **ESTATE FROM YEAR TO YEAR; LANDLORD AND TENANT**.

TENANT IN COMMON,

action by or against, joint or several, 921.

adverse possession of one, against another, 923, 1033, 1039.

adverse possession of purchaser from, as against grantor's cotenants, 1034.

cannot be purchaser at tax sale, 1369.

conveyance to cotenant by, 926.

covenant of seisin violated by existence of, 1123.

created by breaking up of joint or coparcenary estates, 918.

created by express limitation, 915.

created by grant of undivided portion of one's land to stranger, 916.

created by limitation to several "to be equally divided," etc., 917.

TENANT IN COMMON—Continued.

cross executory limitation to, See **EXECUTORY LIMITATION**.

cross remainder to,

See **REMAINDER**.

curtesy in land held by wife as, 233.

disability of one, does not prevent running of statute of limitations against another, 1022.

dower in land held by husband as, 270.

dower to wife of, assigned in undivided portion, 350.

exchange by, 1202.

lapse of devise to, dying during testator's life, 1278.

modes of creating estate of, 914.

nature of estate of, 913.

of party wall, 125.

owner of surface not a, with owner of lower strata, 19.

partition of estate of, 928, 1203.

See **PARTITION**.

possession of one, enures to all, 923.

possession by wife's, is wife's possession for purpose of curtesy, 230.

properties of estate of, 919-926.

redemption by, of land mortgaged, 601, 621.

redemption by, of land sold for taxes, 1376.

release not proper to convey share of one, to another, 1208.

rents and profits accounted for by, 922.

repair of premises belonging to, 924.

survivorship not an incident of estate of, 925.

[References to sections]

TENANT IN COMMON—Continued.

termination of estate of, 927, 928.

union of all shares in one, terminates estate, 927,

union of dominant and servient tract in hands of, does not extinguish easement, 115.

waste by, 439, 441, 922.

TENANT IN COPARCENARY,
See COPARCENER.**TENANT IN FEE SIMPLE**,
See FEE SIMPLE.**TENANT IN TAIL**,
See FEE TAIL.**TENANT PUR AUTER VIE**,
201-203.

See LIFE ESTATE.

emblems for, 44, 46.

See EMBLEMENTS.

**TENDER, OF PERFORMANCE
OF CONDITION**, 556.**TENEMENT**,

annuity not a, 66.

corody not a, 66.

distinguished from modern, 17.

embraces incorporeal as well as corporeal property, 17.

meaning of, 17.

statute de donis embraces only, 176, 177, 178.

statute of Uses embraces only, 463.

**TENENDUM CLAUSE IN
DEED**, 1111.**TENURE**,

allodial, 2, 3, 16.

feudal, 1-16.

nature of, 6.

TERM FOR YEARS,

See ESTATE FOR YEARS; LAND-
LORD AND TENANT; LEASE.

TESTAMENT,

See WILL.

TESTATOR,

See WILL.

seal of, not necessary to will, 1252.

signature of, 1252.

signature of another for, 1252.

will subscribed by witnesses "in presence of," 1262, 1263.

THEOLOGICAL SEMINARY,

devise to unincorporated, 1246.

trust for, 522.

TIMBER,

See FRUCTUS NATURALES; ESTOVERS.

dower in, upon wild land, 291.

sale of growing, within statute of Frauds, 1286.

See STATUTES OF FRAUDS.

distinguished from license, 1286.

implies license to cut and remove, 137.

severed by stranger, belongs to landlord, 376.

waste in, 429, 434.

See WASTE.

TITLE,

by accretion,

See ACCRETION.

by adverse possession.

See ADVERSE POSSESSION.

by alluvion,

See ACCRETION; ALLUVION.

by avulsion,

See ACCRETION; AVULSION.

[References to sections]

TITLE—Continued.

- by contract to convey,
See **CONTRACT TO CONVEY; SPECIFIC PERFORMANCE**.
- by conveyance,
See **CONVEYANCE; DEED; STATUTE OF FRAUDS**.
- by dedication,
See **DEDICATION**.
- by dereliction,
See **ACCRETION; ALLUVION**.
- by descent,
See **DESCENT**.
- by devise,
See **DEVISE; WILL**.
- by eminent domain,
See **CONDEMNATION; EMINENT DOMAIN**.
- by escheat,
See **ESCHEAT**.
- by estoppel,
See **ESTOPPEL**.
- by exception,
See **EXCEPTION**.
- by exercise of power of appointment,
See **POWER; APPOINTMENT**.
- by inheritance,
See **DESCENT**.
- by lease,
See **LEASE; LANDLORD AND TENANT**.
- by occupancy,
See **OCCUPANCY**.
- by prescription,
See **PRESCRIPTION**.
- by reliction,
See **ACCRETION; ALLUVION**.
- by reservation,
See **RESERVATION**.
- by sale,
See **CONTRACT TO CONVEY; SPECIFIC PERFORMANCE**.

TITLE—Continued.

- by tax sale,
See **TAX SALE**.
- by will,
See **WILL; DEVISE**.
- covenants of,
See **COVENANTS**.
- decree for partition vests legal,
1203.
- disclaimer of, by devisee, 1248.
- disclaimer of, by grantee, 1195.
- disclaimer of, by trustee, 516.
- distinguished from estate, 138.
- examination of,
See **DESCRIPTION; LIEN; REGISTRY; RECORDATION**.
- landlord's right to defend tenant's, 403.
- life tenant's duty to defend, 220.
- mistake of law as to, 1185.
- quit claim deed excludes implication of good, 1211.
- registry of,
See **RECORDATION; REGISTRY**.
- transfer of after acquired, by estoppel, 1350.
See **ESTOPPEL**.
- vendee bound to accept defective, when, 1206.
- vendor of chattels annexed to land reserving, may remove them, 27.

TITLE DEEDS,

- deposit of, to secure loan, takes contract out of statute of frauds, 1299.
See **STATUTE OF FRAUDS**.
- equitable mortgage implied from deposit of, 615, 616.

TITLE PARAMOUNT,

- See **CONDITION; RE-ENTRY**.
- curtesy barred by, 235, 249.
- dower defeated by, 266, 304, 249.

[References to sections]

TITLE PARAMOUNT—Cont'd.
 emblements denied, if tenant's estate terminates by, 50.
 jointure of widow lost by, 327.
 rent apportioned upon eviction of tenant by, 412.
 See RENT.
 reversioner by, not bound by covenants in lease, 424.

TOLL ROAD, A FRANCHISE,
 67-69.

TOMB, IN A CHURCH, 130.

TORTIOUS CONVEYANCE,
 alienation of estate for years by, 371.
 alienation of estate for life by, 210.
 alienation of fee tail by, 587, 794, 795.
 as breach of implied condition, 210, 371, 526.
 bargain and sale not a, 1232.
 common recovery a, 210, 1232.
 covenant to stand seised not a, 1232.
 disseisor might pass prima facie title by, 145.
 donee of power in gross, transferring his own interest by, extinguishes power, 1344.
 See POWER.
 feoffment a, 210, 1198, 1232.
 fine a, 210, 1232.
 grant not a, 1231.
 lease and release not a, 1232.

TRADE,
 condition in restraint of, 569.
 See CONDITION.
 fixtures, 31.
 See FIXTURES.

TREASON,
 blood tainted by, causing escheat, 167, 967.
 fee tail forfeitable for, when, 186, 189, 191.
 forfeiture of land for, 166.
 grantee in deed attainted of, 1096.
 grantor in deed attainted of, 1083.
 heir attainted of, 967.

TREASURER OF COUNTY OR CITY,
 cannot purchase at tax sale, 1371.
 current delinquent taxes found in office of, 1392.
 notice by, of tax sale, 1358, 1363, 1383.
 posting by, of delinquent list, 1363.
 return by, of delinquent list, 1363.
 return by, of sales, 1373.
 tax sale by, 1367.
 See TAX SALE.

TREES,
 See FRUCTUS NATURALES; ESTOVERS; TIMBER.

TRESPASS,
 by landlord upon tenant's land, 376.
 by stranger upon tenant's land, 376.
 coparcener liable to cotenant for, 938.
 removal of fixtures by tenant a, when, 37, 38.
 tenant liable to one guilty of, when, 398.

TROVER,
 lies for building on land of another, when, 23.

[References to sections]

TROVER—Continued.

- lies for fixtures removed illegally, 25.
- lies for fructus naturales, illegally or accidentally severed, 41.

TRUST,

See **TRUSTEES; EQUITABLE ESTATE**

- active use converted into direct, 464.
- agent dealing with subject of agency creates a constructive, 481.
- application of purchase money of, 490-496.
- arising from presumed intention, 467-477.
- bank account of trustee, 503.
- cemetery, 522.
- cestui to receive rents and profits of, 487.
- charitable, 522.
- commissioner to execute deeds, etc., in equity, 500.
- condition may create a, 534, 1119.
- confirmation by cestui of trustee's purchase of, 515.
- consideration paid by another than grantee raises an implied, 475, 476, 477.
- constructive, 467, 478-482, 512-515.
- contract creating, within statute of Frauds, 1286.
- conveyance upon, which fails to take effect, 471.
- conveyance without consideration or declaration of, a resulting, 469.
- cotenant buying outstanding

TRUST—Continued.

- claims against estate creates a constructive, 481.
- covenant may create a, 1119.
- creditor takes no better position than debtor as against one claiming debtor's land by resulting or constructive, 1404.
- curtesy in a, 239, 240, 301.
- custody of, by trustee, 503.
- death of trustee, 517, 519, 674, 675, 1332.
- declared as to part, but silent as to rest, 470.
- deed of,
 - See **DEED OF TRUST; MORTGAGE; FRAUDULENT CONVEYANCE**
- definition of, 459.
- depreciated currency accepted by trustee, 505.
- direct, 460-466.
- disclaimer of, by trustee, 516.
- dower in, 282, 301.
- duties of trustee, 497, 665.
- educational, 522.
- ejectment supported or defended by equitable title, when, 486.
- equitable conversion an implied, 474.
- See **EQUITABLE CONVERSION**.
- equitable estoppel as defense to action at law, 486.
- equity of redemption a resulting, 601.
- escheat of equitable estate, 487.
- escheat of legal estate, 499.
- fraud may create a constructive, 482.
- See **FRAUD; FRAUDULENT CONVEYANCE**.
- full power in trustee to control and dispose of, bars curtesy or dower, 301.
- implied, 467, 473-477.

[References to sections]

TRUST—Continued.

in favor of promisee under contract to devise, 1284.

in favor of vendee under contract to convey, 20.

See **CONTRACT TO CONVEY**; **EQUITABLE CONVERSION**; **SPECIFIC PERFORMANCE**.

indemnification of cestui by trustee, 502.

indemnification of trustee by cestui, 511.

indirect, 467-482.

interest chargeable against trustee, 501.

investment of, funds by trustee, 504, 505.

joint acts of trustees, 509.

joint grantees, one of whom pays more than his share, raises an implied, 477.

joint powers in trustees, 1332.

joint receipts by trustees, 509.

joint sales by trustees, 509.

judgment a lien on, when, 487.

judgment against trustee a lien upon land held in, when, 693.

jurisdiction of, in equity, though land is out of Virginia, 1184.

lease renewed in his own name by trustee a constructive, 480.

literary, 522.

local jurisdiction over, 523.

merger of, in legal title, 485, 818.

modes of creating, 460-482.

motion to substitute trustee, 517, 674, 675.

nature of, 458, 460.

notice to purchaser of, direct or constructive, 489.

See **NOTICE**.

of accumulation, 866.

of maintenance, 484.

origin of, 458, 460.

2 Min. Real Prop—50

TRUST—Continued.

parol evidence to establish indirect, 467, 468, 470, 475, 476, 479.

parol evidence to rebut indirect, 475, 476.

partnership realty an instance of implied, 476.

personal representative of trustee to execute, when, 519, 674.

power coupled with, or in nature of, 1330.

See **POWER**.

creates vested or contingent interest in members of class when, 1330.

power not exercised, resulting, when, 1336.

precatory, 520.

purchase of subject of, by trustee, 512-515.

purchaser of, must be complete purchaser, 489.

See **COMPLETE PURCHASER**; **PURCHASER**.

purchaser with notice of, himself a trustee, 488.

purchaser without notice of, not bound by, 483, 487, 488, 489.

purchaser's obligation to see to application of purchase money, 490-496.

religious, 522.

resale of subject of, bought by trustee, at upset price, 514.

resulting, 467, 468-473.

rules governing, in general, 483-486.

sale of, under order of court, 500.

seisin and its principles not applicable to, 483.

spendthrift, 484, 589.

statute of limitations applied to, 1033, 1039, 1052, 1053.

[References to sections]

TRUST—Continued.

subject to cestui's debts and charges, 484, 487.
 subject to trustee's debts, when, 498.
 substitution of trustee, 500, 517-519.
 suit in equity to substitute trustee, 517, 674.
 surviving trustees to execute, 519, 675.
 termination of, extinguishes power of sale in trustee, 1342.
 trustee dealing with subject of, for his own benefit, creates a constructive, 481, 501, 512.
 trustee declining to serve, 519, 675.
 trustee paying for land with funds of, creates a constructive, 479.
 trustee purchasing outstanding claims creates a constructive, 481.
 trustee responsible as a bailee, 497, 503.
 trustee to defend title, 487.
 trustee to execute conveyances as directed by cestui, 487.
 trustee's account of sales, 508, 669.
 trustee's compensation, 507, 510.
 trustee's duties, 497, 665.
 trustee's removal from State, 517, 519, 675.
 trustee's sale under deed of trust, 506-508, 666-669.
 See DEED OF TRUST.
 trustee's security for deferred payments, 505.
 unlawful detainer supported or defended by equitable title when, 486.

TRUST—Continued.

use created by devise a direct, 466.
 use created by feoffment a direct, 466.
 use declared upon possession of a term for years a direct, 465.
 use to legal grantee, 462.
 use unexecuted a direct, 460.
 use upon a use a direct, 463.
 vague and indefinite, void, 521, 522.
 vendor's lien a resulting, 472.
 See VENDOR'S LIEN.

TRUSTEE,

See TRUST; DEED OF TRUST.
 account of sales filed by, 508, 669.
 adverse possession as between, and cestui, 1033, 1039, 1052, 1053.
 after acquired title does not pass to, by estoppel, 1133, 1350.
 cannot purchase at tax sale, 1370.
 compensation of, 507, 510.
 creditor of, cannot subject trust estate, 479.
 dealing with trust subject for his own benefit a constructive, 1097.
 one intended to take only as a, cannot take beneficially under a will, 1251.
 power coupled with a trust in, may be exercised by successor or cotrustee, 1331, 1332.
 power in joint, exercisable severally when, 1332.
 power of sale in, 666, 1317.
 power of sale in, implied, when, 1328.
 power of sale in, to divide pro-

[References to sections]

TRUSTEE—Continued.

ceeds, is a power coupled with a trust, 1330.

power of sale in, to pay debts, is a power coupled with a trust, 1330.

power of sale in, to pay debts, not exercisable if there are no debts or they are paid, 1322, 1342.

power of sale in, terminated by cessation of trust, 1342.

sale by, 666.

See **SALE**.

statutory power of sale in, under deed of trust, 666, 1324.

to preserve contingent remainder, 781.

See **CONTINGENT REMAINDER**.

uncertainty of, in deed or will does not avoid it, 1087, 1246.

under disabilities, doubts, etc., 500.

widow of, not entitled to dower, 268.

See **DOWER**.

words of limitation in deed to, 158.

See **WORDS OF LIMITATION**.

TURBARY, COMMON OF, 73, 74.

See **COMMON**; **PROFIT A PRENDRE**.

TURNPIKE, A FRANCHISE, 67-69.**UNBORN PERSON**.

See **LIMITATION**.

estate tail created by grant to, with remainder to child of, 182.

See **FEE TAIL**.

executory limitation to, when valid, 862.

UNBORN PERSON—Continued.

See **EXECUTORY LIMITATION**.

power conferred on life tenant who is, void, 1326.

remainder to, 747, 780.

See **REMAINDER**.

remainder to children, heirs, etc., of, void, 791.

UNCERTAINTY,

of description,

See **DESCRIPTION**.

of trust, 521, 522.

of trustee, 1087, 1246.

See **TRUST**; **TRUSTEE**.

UNCONSTITUTIONALITY,

of law allowing sale of contingent estates, 804.

of law allowing sale of vested estates, 804.

of law giving curative effect to tax deed, 1387.

of law prolonging period of redemption from tax sale, 1380.

of law shortening period of redemption from tax sale, 1380.

of taxation without due process of law, 1358, 1359, 1386, 1387.

of tax law affects tax sale, 1358, 1386.

of tax sale without due process of law, 1386, 1387.

UNDERGROUND WATERS, 61.

See **WATER RIGHTS**.

UNDUE INFLUENCE, 1245.

See **WILL**; **FRAUD**.

UNINCORPORATED ASSOCIATION,

deed to, when invalid, 1087, 522.

devise to, when invalid, 1246, 522.

[References to sections]

UNLAWFUL DETAINER,

See ACTION; EJECTMENT.

UNNAVIGABLE WATERS,

See PRIVATE WATERS.

UPSET PRICE, 514.

See TRUST; TRUSTEE.

USE,

See STATUTE OF USES; TRUST.

active, not executed, 458, 464.

appointment to future, 449, 450, 1325.

See POWER; APPOINTMENT.

assignable by deed or will, 448.

bargain and sale creates, 451, 455, 456, 466, 1230-1234.

See BARGAIN AND SALE.

cestui que, needful to operation of statute of Uses, 453.

cestui que, must be within consideration, 1232.

consideration sufficient to raise, 1231-1233.

converted into legal estate by statute of Uses, 449, 450, 451, 455, 456.

covenant to stand seised creates, 451, 455, 456, 466, 1230-1234.

created by actual transmutation of possession, 1230.

created without transmutation, 451, 1230-1234.

curtesy in, 448.

declared upon possession of term for years, not executed by statute of Uses, 465.

descendible to heirs, 448.

devisable, 448.

devise to, unexecuted in Virginia, 451, 456, 466.

dower not allowed in, 448.

feoffment to, 450, 451, 466.

USE—Continued.

flexibility of, 449.

future freehold by way of, 449.

history and origin of, 447.

in esse necessary, 454.

liability of, to debts, 448.

liability of, to feudal burdens, 448.

livery of seisin not needed to transfer, 448, 449.

love and affection, a consideration to support, 450, 455, 456. nature of, 447.

person seised to, 452.

power of appointment to, 449, 450.

power of revocation of, 449, 450, 1327.

power taking effect as a, 1325.

See POWER.

revocation of, 449, 450, 1327.

seisin to serve, 452.

shifting, 449.

springing, 449.

statute of Uses executes, 449, 450, 455, 1232.

See STATUTE OF USES.

upon a, not executed, 463, 1232.

valuable consideration to support bargain and sale, 450, 451, 455, 456, 1231-1233.

words of limitation to create inheritance in, 450.

See WORDS OF LIMITATION.

USER, ADVERSE,

See PRESCRIPTION.

USES, STATUTE OF,

See STATUTE OF USES.

VAGUE DESCRIPTION,

See DESCRIPTION.

VALUABLE CONSIDERATION,

See CONSIDERATION.

[References to sections]

VALUATION OF LAND FOR TAXATION, 1358, 1359, 1386, 1387.

See **TAXATION**; **TAX**; **TAX SALE**.

VAULT, IN CHURCH FOR BURIAL, 130.**VENDEE**,

See **VENDOR**; **TRUST**; **SALE**; **CONTRACT TO CONVEY**; **CONVEYANCE**; **STATUTE OF FRAUDS**; **PURCHASER**.

adverse possession of, as against vendor, 1033, 1039.

assignee of, bound by judgment against, when, 474.

bound to accept defective title, when, 1306.

chattels annexed to land pass with land to, 36.

See **FIXTURES**.

dower of widow of, as against vendor's widow, 274, 275.

as against vendor's claim to purchase money, 284.

as against vendee's assignee, 284.

See **DOWER**.

interest of, becomes land by equitable conversion, 20.

See **EQUITABLE CONVERSION**.

lien of, for purchase money partly paid, 689.

rights of, as against vendor, 1314.

title of, under contract of sale,
See **CONTRACT TO CONVEY**; **SPECIFIC PERFORMANCE**.

VENDOR,

See **VENDEE**; **CONTRACT TO CONVEY**; **CONVEYANCE**; **SALE**; **TRUST**; **STATUTE OF FRAUDS**.

VENDOR—Continued.

assignee of, may enforce con-
against vendee, 1304.

authority of real estate agent extends to bring, in touch with vendee, 1105.

See **REAL ESTATE AGENT**.

bound to convey good title, when, 1306, 1314.

cannot be agent for vendee, or vice versa, 1289.

dower of widow of, as against vendee's widow, 274, 275.

in land contracted to be sold, 268.

See **DOWER**.

heirs of, cannot compel specific performance, 1304.

heirs of, liable to specific performance, 1304.

interest of, in land sold, becomes personalty by equitable conversion, 20.

See **EQUITABLE CONVERSION**.

lien of, for unpaid purchase money,

See **VENDOR'S LIEN**.

may specifically enforce contract against vendee, 1304.

reservation in, of title to chattels annexed to land, 27.

See **FIXTURES**.

reservation in, of title to land sold, 472, 617, 688.

rights of, to unpaid purchase money as against dower of vendee's widow, 284.

See **PRIORITY**; **DOWER**.

VENDOR'S LIEN,

an equitable lien, 680, 682.

an equitable mortgage, 617.

assignment of debts secured by, 684.

[References to sections]

VENDOR'S LIEN—Continued.

assignment of land subject to, 683.

binds land, 682.

contrasted with vendor's reservation of title, 617, 688.

creditor secured by, not a purchaser, 593, 682.

debt barred by statute does not bar, 687.

dower in land subject to, 269.

dower in surplus after payment of, 283-287.

See DOWER.

enforcement of, 687.

express, 472, 682-688.

form of reservation of, immaterial, 682.

implied, 472, 681.

implied, a resulting trust, 472.

implied, abolished in Virginia, 472, 681.

laches affects enforcement of, 687.

presumption of satisfaction of, after twenty years, 626, 687.

purchaser paying off, subrogated, 685.

registry of, 1390, 1392.

release of, 683, 686.

vendee's acts cannot impair, 682.

waiver of, 683, 687, 688.

VERBAL,

See PAROL.

VESTED INTEREST,

See VESTED REMAINDER; REMAINDER; REVERSION; EXECUTORY LIMITATION.

after acquired title by estoppel prevented by, in lessor, 1349.

power coupled with trust, in de-

VESTED INTEREST—Cont'd.

fault of appointment, creates, in class, when, 1330.

power released to one holding, 1345.

waste sued for by one holding, 441.

VESTED REMAINDER,

See REMAINDER; VESTED INTEREST; LIMITATION.

acceleration of, 783.

contingent remainder may become, 740.

contingent remainder may become, while others earlier in order remain contingent, 797.

See CONTINGENT REMAINDER

creditor may subject, to debts, 805.

See CREDITOR.

criterion to ascertain, 736, 739.

curtesy barred by interpolated, 236, 237.

defeasible upon condition subsequent, 743.

defeated if preceding estate is void in its creation, 735.

definition of, 739.

dower barred by interpolated, 273, 276, 277, 302.

limitations by way of,

See LIMITATION.

nature of, 739.

sale of, under order of court, 804.

subsequent destruction of particular estate does not affect, 780.

to a certain person, 739, 749, 751.

to a class of persons, 749.

to designated heirs of living person, 751.

to surviving children, etc., 743.

transfer of, 802, 804.

where there is a practical cer-

[References to sections]

VESTED REMAINDER—Cont'd.

tainty that condition precedent will occur during particular estate, 746.
words construed as importing time of enjoyment and not contingency, 744.
words construed as creating, rather than contingent, if possible, 743, 744.

VIEW, EASEMENT OF, 127.

See EASEMENT.

VILLEINAGE, TENURE IN, 6.

VILLEIN SOCAGE, TENURE IN, 6.

VIVUM VADIUM, 603.

VOLUNTARY CONVEYANCE,

as between the parties, 1157, 1179.
as evidence of fraud, 1179.
as to existing creditors, 1157, 1179.
as to subsequent creditors, 1157, 1179.
as to purchasers, 1157, 1179.
as to subsequent purchaser without value, 1172.
instances of consideration which prevent conveyance from being, 1180-1182.
See CONSIDERATION.
marriage as a valuable consideration, 1181.
recital of payment of consideration in, 1158.
resulting trust created by, when, 469.
statute of limitations applicable to, 1051, 1053, 1178, 1179.

VOLUNTARY WASTE, 427-432.

See WASTE.

WAIVER,

of forfeiture for breach of condition, 560.
of judgment lien, 698.
of mechanic's lien, 727.
of notice to terminate estate from year to year, 392.
of performance of condition, 558, 559.
of vendor's lien, 683, 687, 688.

WARDSHIP, INCIDENT TO FEUDAL TENURE, 10.

WARRANTY, ANCIENT,

collateral, 1114.
commencing by disseisin, 1114.
compensation for breach of, 1114, 1115.
creation of, 1114.
distinguished from personal covenants, 1114.
effect of, upon warrantor, 1114, 1115, 1116.
effect of, upon warrantor's heirs, 1114, 1115, 1116.
estoppel by, of warrantor's claims, 1114, 1116.
express, 1114.
feoffment containing, transfers after acquired title by estoppel, 1348.
implied, 347, 947, 1114, 1202.
lineal, 1114.
rebuttal by, of claims of warrantor or his heirs, 1114, 1116.

WARRANTY, COVENANT OF,

See COVENANT.
broken by eviction, 1130.
contrasted with covenant against incumbrances, 1130.
eviction actual or constructive, 1130.

[References to sections]

WARRANTY, COVENANT OF

—Continued.

eviction distinguished from a trespass, or disseisin, 1130.

See **EVICITION**.

general, 1128, 1130.

liability of remote grantors upon, 1131.

measure of recovery upon, 1132.

operation of, by way of estoppel, 1133, 1350.

See **ESTOPPEL**.

special, 1128, 1129.

tax deed to contain a special, 1382.

verbiage of general, 1128.

verbiage of special, 1128.

WASTE,

action for, survives, 441.

actions for, 443, 444.

assumpsit for, 444.

by coparceners, 439, 441, 938.

by guardian, 439.

by joint tenants, 439, 441, 891.

by life tenant, 213, 437, 438, 439.

by mob, 433.

by stranger, 433.

by tenant at will, 383, 385, 438, 439.

by tenant by curtesy, 437, 438, 439.

by tenant cutting more estovers than necessary, 41.

by tenant for years, 374, 401, 416, 438, 439.

by tenant from year to year, 439.

by tenant in common, 439, 441, 922.

by tenant in dower, 437, 438, 439.

by tenant in fee simple, when, 437.

WASTE—Continued.

by tenant in tail, not punishable, 191, 437.

by tenant in tail after possibility of issue extinct, not punishable, 192.

by tenant removing fixtures, 37, 38.

See **FIXTURES**.

changing course of husbandry as, 430.

covenant lies for, when, 444.

covenant not to commit, 444.

damages for, 440.

damages for, in equity, 442.

definition of, 426.

destruction by act of God when, 426.

equitable, 434-436, 442.

equitable owner may complain of, 436, 441, 442.

estrepement, as a remedy for, 439, 442.

fee simple owner may complain of, when, 441, 443.

fire injuries when, 426, 428, 433.

forfeiture for, 440.

heir may complain of, when, 441.

in agricultural land, 430.

in buildings, 428.

in equitable estates, 436, 441, 442.

in fixtures, 432, 37, 38.

in mines, quarries, etc., 431.

See **MINERALS; MINES**.

in ornamental and shade trees, 434, 442.

in timber, 429, 434.

injunction lies for, 442.

life tenant may complain of, 441, 443.

malicious, by tenant dispunishable for, 438, 442.

nature of, 426.

negligent, 426, 433, 438.

[References to sections]

WASTE—Continued.

pending suit, 439, 442.
 permissive, 426, 433, 438.
 punishment for, 440.
 quasi, 441, 443.
 remainderman may complain of, when, 441.
 repairs by tenant to avoid, 426, 433.
 reversioner may complain of, 441.
 tenant for years may complain of, 441, 443.
 tenants punishable for, 437, 439.
 treble damages for, when, 440, 443.
 trespass on case for, 441, 443.
 voluntary, 427-432.
 voluntary, terminates estate at will, 438, 439.
 who entitled to complain of, 441.
 writ of, 441, 442, 443.

WASTE LAND,

adverse possession of, 1033.
 dower in, 291.

WATER,

description of, in conveyance, 19.
 rights,

See **WATER RIGHTS**.

title to land formed by action of, 1010-1015.

See **ACCRETION**.

WATER RIGHTS,

See **SURFACE WATER**; **EASEMENT**; **PUBLIC WATERS**.

action for breach of, 55, 56, 57, 1066.

appropriation of water by upper proprietor, 55, 62, 128.

as corporeal rights, 52-62.

as easements, 99, 128.

See **EASEMENT**; **SURFACE WATER**.

WATER RIGHTS—Continued.

assignment of, to others not riparian owners, 55.

created by transfer of quasi dominant tract, 104.

created by transfer of quasi servient tract, 107.

diversion of stream, 55.

excessive appropriation of water by lower proprietor not a prescriptive right, 1066.

extend only to riparian proprietors, 55.

flow of surface water not a prescriptive right, 1066.

general nature of, in running water, 53, 61, 62.

in surface water, 99, 128.

See **SURFACE WATER**.

milling acts, 57.

obstruction of flow by lower proprietor, 57.

overflowing streams, 57.

percolating waters, 62, 1066.

pollution of water, 55, 56, 61, 62, 103.

private waters, 59.

public waters, 58.

See **PUBLIC WATERS**.

streams as boundaries of property, 60.

subterranean streams, 61.

wharf rights, 58.

WAY,

an easement, 119.

See **EASEMENT**.

arising by estoppel, 109.

arising by grant, 100, 102.

arising by necessity, 103, 106.

arising by prescription, 1061, 1062.

See **PRESCRIPTION**.

arising by reservation, 101, 105.

See **RESERVATION**.

[References to sections]

WAY—Continued.

cart, 120.
 common, 120.
 drive, or drift, 120.
 extent of, measured by express terms of grant, 100.
 extent of, measured by needs of dominant tract, 94.
 extinguishment of, 110-117.
 foot, 120.
 horse, 120.
 interruption of, by owner of land affects prescriptive title to, 1061, 1062.
 over adjacent land, when, 121.
 private, 119, 120, 121.
 public, 119, 120, 121.
 See HIGHWAY.
 rent cannot issue out of a, 82.
 repair of, 121.
 vendor describing land as bounded on street estopped to deny right of, 109.

WELL,

cutting off percolating water from, 62.
 pollution of, 62.

WELSH MORTGAGE, 620.**WIFE,**

 See MARRIED WOMAN; DOWER.
 contract of husband not specifically enforceable if it leads to coercion of, 1314.
 love for, sufficient consideration to support covenant to stand seised, 1233.
 of devisee, legatee or creditor as attesting witness to will, 1256, 1257, 1259.
 See ATTESTING WITNESS; WILL.
 provision for, a meritorious con-

WIFE—Continued.

sideration to support specific performance, 1311.
 See SPECIFIC PERFORMANCE.

WILD LAND,

adverse possession of, 1033.
 dower in, 291.

WILD'S CASE, RULE IN, 183.**WILL, ESTATE AT,**

 See ESTATE AT WILL.

WILL OF LAND,

 See DEVISE.
 acknowledgment of, before attesting witnesses, 1254, 1260.
 actual disposition of property in, necessary, 1251.
 after acquired land included in, 1249.
 ambulatory, 1239.
 attestation clause without witnesses does not affect, 1253.
 attesting witnesses to, 1254-1263.
 See ATTESTING WITNESS.
 bond may be good as a, 1251.
 by local custom, 6, 1240.
 cancelling of, revokes, 1269.
 capacity to be devisee, 1246, 1247.
 capacity to execute, 1241-1243.
 competency of witnesses to, 1255-1259.
 condition that devisee shall not contest, 1282.
 conditional in form, 1251.
 confirmation of infant's, 1244.
 consists of all testamentary papers, not inconsistent with last written, 1251, 1253.
 construction of, 1281.
 See LIMITATION.

[References to sections]

WILL OF LAND—Continued.

contract to execute, raises a trust against promisor's heirs, 1284.
 deaf and dumb person as maker of, 1242.
 deed taking effect as, 1251.
 definition of, by statute, 1239.
 description of devisee in, 1246.
 description of property devised in, 1249.
 destruction of, revokes, when, 1269.
 disclaimer by devisee under, 1248.
 disinheritance of relatives, not proof of testamentary incapacity, 1243.
 distinguished from declaration revoking, 1268.
 eccentricity not proof of incapacity, 1242.
 fee tail created in, by implication, 182-184, 195.
 fee tail not alienable by, 189, 190.
 force affects validity of, 1245.
 formal attestation not necessary to, 1254.
 formalities of, 1250-1263.
 formalities of, in exercise of power, 1250.
 executed by married woman, 1250.
 fraud affects validity of, 1245, 1251.
 fructus industriales pass under, 43.
 fructus naturales pass under, 40.
 habitual drunkenness affects capacity to make, 1242.
 holograph, 1252, 1253.
 imbecility affects capacity to make, 1242.
 in exercise of power, 1250, 1333.

WILL OF LAND—Continued.

defectively executed, aided in equity, 1338.
 See **POWER**.
 infancy of testator as affecting capacity, 1244.
 insanity affects capacity to make, 1242, 1243.
 lapse of, 1278-1280.
 See **LAPSED DEVISE**.
 letter taking effect as, 1251.
 married woman's devise in exercise of power, 1250, 1338.
 married woman's devise of equitable separate estate affects curtesy, 240.
 nature of, 1239.
 origin of, 1240.
 power conferred by,
 See **POWER**.
 to be executed by, may be by deed, when, 1333.
 to be executed by deed, may be, when, 1333, 1338.
 upon executor may be exercised by administrator c. t. a, when, 1324.
 presumption of revocation from loss or mutilation of, 1269.
 probate of, 1281.
 property devisable by, 1249.
 publication of, 1275.
 registry of, 1281, 1390, 1392.
 republication of, 1275-1277.
 residuary devise in, 1276.
 revival of revoked, 1275-1277.
 revocation of, 1239, 1264-1274, 1276.
 dependent relative, 1266.
 express, by cancellation, etc., 1269.
 express, by declaration in form of, 1268.

[References to sections]

WILL OF LAND—Continued.

express, by subsequent will or codicil, 1267.
 implied from subsequent alienation, 1265, 1270.
 implied from subsequent birth of children, 1272-1274.
 implied from subsequent marriage, 1271.
 parol evidence to show intent to revoke, 1266.
 revocation of revoking act, 1276.
 seal not required for, 1252.
 signature of attesting witnesses to, 1254, 1263.
 at end of paper, 1254.
 "in testator's presence," 1263.
 signature of testator to, 1252, 1253, 1254, 1260.
 in presence of attesting witnesses, 1254, 1260.
 intended to show finality of intent, 1252, 1253.
 must be intended as such, 1252, 1253.
 speaks as of testator's death, 1249.
 tacking of possession by devisee of one in adverse possession, 1029.
 testator's mark a sufficient signature, 1252.
 to be qualified by verbal instructions only to prevent fraud, 1251.
 under burgage and gavelkind tenure, 6.
 use created by, unexecuted, 466.
 use passes under at common law, 448.
 whole, to be in writing, 1251, 1253.
 words of limitation not essential in, 154.

WILLS, STATUTE OF, 1240, 1241, 1250.

See **STATUTE OF WILLS**; **WILL**; **DEVISE**.

WITNESS,

See **EVIDENCE**; **ATTESTING WITNESS**; **WILL**.
 authentication of writing for registry by, 1145, 1395.
 called to prove will distinguished from attesting, 1254.
 signature of party as a, may be sufficient signature under statute of Frauds, 1289.
 to deed, 1142, 1145, 1395.
 to will, 1254-1263.
 See **ATTESTING WITNESS**.
 to will in exercise of power, 1333, 1338.

WORDS OF LIMITATION,

any words showing intent suffice in will, 154.
 children as, 181, 182, 183, 195.
 contrasted with words of purchase, 151.
 descendants as, 181.
 dispensed with in frank marriage, 185.
 heirs as, 151, 152, 154.
 heirs as word of purchase, 152.
 heirs of body as, 180.
 implied in will, 182-184.
 in common law conveyances, 150, 151, 180, 198.
 in deed of confirmation, 1221.
 in deed referring to another deed containing, 156.
 in deed to corporation, 157.
 in deed to trustee, 158.
 in exception, 155.
 in quit claim deed, 159.
 in release by enlargement, 159, 1209.

[References to sections]

WORDS OF LIMITATION—

Continued.

in release passing an estate, 159, 1208.

in reservations, 155, 160.

in Virginia, 160.

include all future generations, 152.

issue as, 181, 182, 183.

rule in Wild's case, 183.

to create estates of inheritance, 150, 151-160.

to create fee tail, 180, 181, 182-185, 195.

to create inheritance in use, 450.

WRIT OF DOWER UNDER NIHIL HABET, 352.

See DOWER.

WRIT OF ELEGIT, 165, 692.**WRIT OF ESTREPEMENT, 439, 442.****WRIT OF PARTITION, 957.**

See PARTITION.

WRIT OF RIGHT, 211, 352.**WRIT OF RIGHT OF DOWER, 352.**

See DOWER.

WRIT OF WASTE, 443.

See WASTE.

WRITING,

acknowledgment of, for registry,

See ACKNOWLEDGMENT; REGISTRY.

attesting witness to,

See ATTESTING WITNESS.

contract to convey or lease to be in, when, 1285-1300.

See CONTRACT TO CONVEY; SPECIFIC PERFORMANCE; STATUTE OF FRAUDS.

license need not be in, 134.

See LICENSE.

parol evidence to vary, 47, 601, 1232, 1315.

See EVIDENCE; PAROL.

registry of,

See REGISTRY; RECORDATION.

signature to,

See SIGNATURE.

under seal,

See CONVEYANCE; DEAD; SEAL; STATUTE OF FRAUDS.

will to be in, 1251.

See WILL.

